

3-15-2010

The Supreme Court's Take on Immigration in *Nken v. Holder*: Reaffirming a Traditional Standard that Affords Courts More Time and Flexibility to Decide Immigration Appeals before Deporting Aliens

Elizaveta Kabanova

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/naalj>

 Part of the [Administrative Law Commons](#), [Courts Commons](#), [Immigration Law Commons](#), [Judges Commons](#), [Jurisdiction Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), [Legal History, Theory and Process Commons](#), [Legislation Commons](#), [Litigation Commons](#), [Politics Commons](#), [President/Executive Department Commons](#), [Public Law and Legal Theory Commons](#), and the [Remedies Commons](#)

Recommended Citation

Elizaveta Kabanova, *The Supreme Court's Take on Immigration in *Nken v. Holder*: Reaffirming a Traditional Standard that Affords Courts More Time and Flexibility to Decide Immigration Appeals before Deporting Aliens*, 30 J. Nat'l Ass'n Admin. L. Judiciary Iss. 1 (2010)
Available at: <http://digitalcommons.pepperdine.edu/naalj/vol30/iss1/6>

This Note is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

The Supreme Court’s Take on Immigration in *Nken v. Holder*: Reaffirming a Traditional Standard That Affords Courts More Time and Flexibility to Decide Immigration Appeals Before Deporting Aliens

By Elizaveta Kabanova*

TABLE OF CONTENTS

I. INTRODUCTION.....	184
II. HISTORICAL BACKGROUND	185
<i>A. Immigration in the United States: Refugees and Asylees</i>	185
<i>B. Asylum Claim Appeal Process</i>	191
<i>C. Changes to the Judicial Review Process</i>	193
1. The Language of the INA and Automatic Stays Under Former § 1105a	193
2. The New Test: IIRIRA	195
<i>D. Competing Standards</i>	196
1. The “Traditional Standard” for Stays	196
2. “Clear and Convincing Evidence” Standard under Subsection (f)(2).....	198
<i>E. Case Law: Jurisdictional Split in Courts of Appeals</i>	198
1. Cases Using A Broad Interpretation of Term “Enjoin”	199
2. Cases Using A Broad Interpretation of Term “Enjoin”	200
III. FACTS.....	203
IV. ANALYSIS OF COURT’S OPINION	207
<i>A. Chief Justice Roberts’s Majority Opinion</i>	207
<i>B. Justice Kennedy’s Concurring Opinion</i>	215
<i>C. Justice Alito’s Dissenting Opinion</i>	216
V. IMPACT OF THE COURT’S DECISION	223
<i>A. Broad Impact</i>	223
1. Increase in Immigration Appeals in the early 2000s	223
2. Opening Up the Gate for Further Immigration Appeals.....	225
<i>B. Legal Impact</i>	227
1. Immigration Under the Obama Administration.....	227
2. Immigration and the United States Supreme Court.....	230
VI. CONCLUSION	233

I. INTRODUCTION

"If you send me back home, I will be killed." How many immigration agents have heard a person say words to this effect? How many times have judges had to decide on the safety of an immigrant requesting an order to remain in this country? For some applicants, time is of the essence; their safety is not guaranteed if they are deported. Nevertheless, with thousands of individuals seeking refuge in the United States,¹ an efficient method of screening refugee and asylum applicants is important, not only initially, but also at the appeals level.

A debate regarding the difficult balance between spending an appropriate amount of time deciding the fates of refugee and asylum applicants against the efficiency of the process caused division within the United States Supreme Court. At issue in *Nken v. Holder*² is the appeal to stay a removal order of a Cameroon citizen who applied for asylum in the United States. Although the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)³ had previously limited immigration judges' ability to grant stays for applicants, the Court held that the broader traditional test applies to the appeal of a stay.⁴ The Court held that IIRIRA applies exclusively to injunctions.⁵ Because stays are outside the scope of IIRIRA, the

* Second-year law student at the Pepperdine University School of Law and member of NAALJ journal. I am very thankful to former Judge Bruce J. Einhorn of the United States Immigration Court for his guidance and research suggestions prior to beginning my case note. I would also like to thank my family, friends and professors at Pepperdine for their encouragement and support in writing this article.

1. Daniel C. Martin & Michael Hoefer, *Refugees and Asylees: 2008*, Office of Immigration Statistics at 1, available at www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2008.pdf. For fiscal year 2008, some 60,108 individuals were admitted into the United States as refugees and 22,930 people were admitted as asylees. *Id.* Fiscal years last between October 1 and September 30 of the following year. *Id.*

2. *Nken v. Holder*, 129 S. Ct. 1749 (2009).

3. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252 (2005), Pub. L. No. 104-208, 110 Stat. 3009 (1996).

4. *Nken*, 129 S. Ct. at 1754.

5. *Id.* at 1756.

Court held that the broader traditional test applies in the case of Nken's stay of removal, rather than the less inclusive IIRIRA test.⁶

This case note examines the present Supreme Court case, analyzing the majority opinion's decision to question the logic of a narrow legislative standard and reapply a traditional interpretation of judicial authority to decide the issue of stays. Part II outlines the historical background of the case including an explanation of immigration, the asylum process, pertinent case law, and the different standards for judicial review of stays.⁷ Part III relates the pertinent facts of the case.⁸ Part IV analyzes arguments of the majority, concurring, and dissenting opinions.⁹ Part V explores the possible legal and broader societal impacts of the decision.¹⁰ Part VI concludes the note.¹¹

II. HISTORICAL BACKGROUND

A. Immigration in the United States: Refugees and Asylees

Throughout its history, the United States has drawn many immigrants both legal and illegal.¹² Thousands of individuals seeking refuge or asylum arrive in the United States every year. In 2008 alone, 60,108 individuals were admitted into the United States as refugees, and 22,930 people were admitted as asylees.¹³ As a

6. *Id.*

7. See *infra* notes 12-124 and accompanying text.

8. See *infra* notes 125-146 and accompanying text.

9. See *infra* notes 147-231 and accompanying text.

10. See *infra* notes 232-285 and accompanying text.

11. See *infra* note 286-291 and accompanying text.

12. "Historically, the United States has been a beacon of hope for oppressed and persecuted people and for those simply seeking a better place to live and work." Martin S. Krezalek, *How to Minimize the Risk of Violating Due Process Rights While Preserving the BIA's Ability to Affirm Without Opinion*, 21 GEO. IMMIGR. L.J. 277, 281 (2007).

13. Martin & Hoefer, *supra* note 1, at 1. See also 2008 Yearbook of Immigration Statistics, Office of Immigration Statistics (Aug. 2009) at 1, available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf; *Refugee Arrivals: Fiscal Years 1980 to 2008*, Department of Homeland Security, available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/table13.xls>.

result of the United Nations Protocol Relating to the Status of Refugees (U.N. Protocol),¹⁴ ratified by the United States in 1967, Congress passed the Refugee Act of 1980¹⁵ to establish a definition of refugees in compliance with the U.N. Protocol.¹⁶ Nevertheless, admission of refugees is not limitless, and each year the President, upon consulting Congress, determines an admissions ceiling for refugees.¹⁷ The President increased this ceiling to 80,000 in fiscal year 2008,¹⁸ the total number of refugees admitted during that year alone.¹⁹ The proposed ceiling for fiscal years 2009 and 2010 is 80,000.²⁰

14. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. The Protocol was adopted in January 31, 1967, but it entered into force October 4, 1967. James A. Sweeney, *Credibility, Proof And Refugee Law*, 21 INT'L J. REFUGEE L. 700, 726 (2009); see also Susan M. Akram & Terry Rempel, *Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees*, 22 B.U. INT'L L.J. 1, 162 n.8 (2004).

15. Refugee Act of 1980, 8 U.S.C. § 1101, Pub. L. 96-212, 94 Stat. 102 (1980).

16. Martin & Hoefer, *supra* note 1, at 2. The term "refugee" was defined initially in the 1951 United Nations Convention Relating to the Status of Refugees, which the United States did not ratify. Stanley Dale Radtke, *Defining a Core Zone of Protection in Asylum Law: Refocusing the Analysis of Membership in a Particular Social Group to Utilize Both the Social Visibility and Group Immutability Component Approaches*, 10 J. L. & SOC. CHALLENGES 22, 27-28 (2008). Nevertheless, the same definition was used in the Protocol to which the United States later acceded. *Id.*

17. Martin & Hoefer, *supra* note 1, at 2.

18. The ceiling "increased from 70,000 in 2007 to 80,000 in 2008, due to the expected resettlement of Iraqi, Bhutanese, and Iranian refugees in the Near East, South Asia region." *Id.*

19. *Id.*

20. U.S. Dep't of State et al., *Proposed Refugee Admissions for Fiscal Year 2010 Report to the Congress* 5 (2009), available at www.state.gov/documents/organization/129393.pdf; Jennifer Rikoski & Jonathan Finer, *Out of Iraq: The U.S. Legal Regime Governing Iraqi Refugee Resettlement*, 34 RUTGERS L. REC. 46, 53 (2009) (citing U.S. Dep't of State et al., *Proposed Refugee Admissions for Fiscal Year 2009 Report to the Congress* 50 (2008), available at <http://www.state.gov/documents/organization/113507.pdf>). The approximate target number for Iraqi refugees to be admitted in fiscal year 2009 was 17,000. Rikoski & Finer *supra* at 53 (citing Ambassador James B. Foley, Senior Coordinator for Iraqi Refugee Issues, Briefing on Developments in the Iraqi Refugee Admissions and Assistance Programs at the U.S. Department of State

There is a lengthy application process for an individual hoping to become an official refugee.²¹ To qualify for refugee status, an applicant must: (1) “be of special humanitarian concern to the United States;”²² (2) qualify as a refugee under section 101(a)(42) of the Immigration Nationality Act (INA);²³ (3) be admissible under INA;

(Sept. 12, 2008), available at <http://merln.ndu.edu/archivepdf/iraq/State/109568.pdf>.

21. See generally Martin & Hoefer, *supra* note 1, at 2.

22. The President determines what qualifies as a humanitarian concern after consulting Congress, basing his decision on whether “an unforeseen emergency refugee situation exists” and whether admitting the refugee “is justified by grave humanitarian concerns or is otherwise in the national interest.” Victoria Rapoport, *The Politicization of United States Asylum and Refugee Policies*, 11 SCHOLAR 195, 199-200 (2009) (citing Immigration and Nationality Act § 207(b), 8 U.S.C. § 1157(b) (2007); Immigration and Nationality Act § 207(e), 8 U.S.C. § 1157(e) (2007)). Furthermore, the task of defining “refugees of special humanitarian concern” falls on the President to be defined on “case-by-case basis in consultation with Congress.” Daniel J. Steinbock, *The Qualities of Mercy: Maximizing The Impact Of U.S. Refugee Resettlement*, 36 U. MICH. J.L. REFORM 951, 962 (2003) (citing H.R. Rep. 96-608, 96th Cong. at 13; Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 12-17 (1981)). Moreover, the United States uses a priority system for accepting applicants, following the President’s recommendations in his annual report to Congress about refugee admissions. Marisa Silenzi Cianciarulo, *The W Visa: A Legislative Proposal for Female and Child Refugees Trapped in a Post-September 11 World*, 17 YALE J.L. & FEMINISM 459, 472 (2005) (citing UNHCR, *Resettlement Handbook and Country Chapters*, Ch. U.S.A. 2 (2004), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&page=PROTECT&id=3c5e5a764>). For instance, in 2005, President Bush identified various priority groups including Cuban human right activists, Iranian religious minorities, Jews, Evangelical Christians, and Orthodox Church members in the former Soviet Union. Steve Swerdlow, *Understanding Post-Soviet Ethnic Discrimination and the Effective Use of U.S. Refugee Resettlement: The Case of the Meskhetian Turks of Krasnodar Krai*, 94 CAL. L. REV. 1827, 1857 (citing Foreign Operations, Export Financing, and Related Programs Appropriations Act, 8 U.S.C. § 1101, Pub. L. No. 101-167, § 599D, 103 Stat. 1261 (1989), as amended).

23. Immigration and Nationality Act, 8 U.S.C. § 1101 (2009). “Refugee” under section 1101(a)(42) is defined as follows:

The term “refugee” means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of

and (4) not be “‘firmly resettled’²⁴ in a foreign country.”²⁵ The INA is discussed in further detail below.²⁶

the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term “refugee” does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

Id. at § 1101(a)(42).

24. As codified under IIRIRA, “[a] person is considered to be firmly resettled if ‘prior to arrival in the United States, he or she entered another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement.’” Rachel D. Settlage, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate*, 27 B.U. INT’L L.J. 61, 86 (2009) (citing 8 C.F.R. 208.15 (2008)). Courts require an applicant to rebut a firm resettlement assertion by showing that it was necessary to be present in that country “for her onward flight” and that the presence did not establish any ties, that the applicant was not offered to resettle, and that the applicant’s movements “were so restricted by the authority of the country as to constitute non-resettlement.” Settlage, *supra*, at 86 (citing 8 C.F.R. 208.15 (a)-(b)(2008)). Depending on the jurisdiction, some courts require a totality of the circumstances determination, while other courts initially place the burden of proof on the government to prove that an offer of resettlement was made, which once proven must be rebutted by the applicant to prove that she was not firmly resettled. Settlage, *supra*, at 86 (citing *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 818-21 (9th Cir. 2004); *Diallo v.*

Although immigration law in the United States is known for its complex nature, individuals who seek refuge in the United States fall within two simple categories: refugees and asylees.²⁷ While both refugees and asylees seek refuge in the United States from fear of persecution in their native countries, the key difference between the two is that refugees are people who seek refuge when they are outside the United States, while asylees are already within the United States when they seek asylum.²⁸ Nken was classified as an asylee, as he was already living in the United States when he applied to be granted refuge in the United States.²⁹

In order to apply for refugee status, individuals must first be part of the United States Refugee Admissions Program (USRAP).³⁰ Various agencies, including the U.N. High Commissioner for Refugees (UNHCR), the U.S. Embassy, and other humanitarian organizations, must refer these individuals to USRAP.³¹ Applicants next go through interviews, security checks, and must submit various

Ashcroft, 381 F.3d 687, 693 (7th Cir. 2004); *Abdille v. Ashcroft*, 242 F.3d 477, 487-89 (3d Cir. 2001)). This second standard is used by the Asylum Officer Corps Basic Training Course manual, which adds that an offer of resettlement or permanent resident status is the primary consideration. Settlege, *supra*, at 86 (citing *Immigration Officer Academy, Asylum Officer Basic Training Course, Lesson: Mandatory Bars to Asylum and Discretion* at 26 (December 5, 2002), available at <http://www.rmscdenvr.org/aobtc/Bars5dec02lplinks.pdf>).

25. Martin & Hoefer, *supra* note 1, at 2.

26. See *infra* notes 67-73 and accompanying text.

27. Martin & Hoefer, *supra* note 1, at 1. This distinction originated from the Refugee Act of 1980. *Id.* at 2.

28. *Id.* at 1.

29. See generally *Nken*, 129 S. Ct. at 1754.

30. Martin & Hoefer, *supra* note 1, at 2.

31. *Id.* UNHCR is governed by 1951 Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention. Heidi H. Boas, *The New Face of America's Refugees: African Refugee Resettlement to the United States*, 21 GEO. IMMIGR. L.J. 431, 437 (2007). Its task is to organize worldwide refugee resettlement and to refer groups to receiving countries, including the United States, so that the refugees can be considered for resettlement. *Id.* Typically, UNHCR refers individuals whose home countries are "no longer safe or practical for them to remain." *Id.* It is within the President's power, after consulting Congress, to determine which refugees to admit every year. *Id.* Therefore, UNHCR referrals are not required, and refugee referrals from other organizations are also used in deciding whether to admit an individual. See *id.*; see also Martin & Hoefer, *supra* note 1, at 2.

related documents so that U.S. Citizen and Immigration Services (USCIS) can determine whether the applicant is eligible for resettlement.³² Then, the refugee is met at the airport by a sponsor resettlement agency, which makes housing arrangements and prepares a resettlement plan.³³ Travel is arranged by the International Organization for Migration (IOM).³⁴

To apply for asylee status, a person must be an “alien”³⁵ present in the United States or at a port of entry . . . regardless of his or her immigration status.”³⁶ There are two paths³⁷ for applying for asylum.³⁸ An individual can either apply affirmatively, through a USCIS Asylum Officer, or defensively, “in removal proceedings before an immigration judge of the Executive Office for the Immigration Review (EOIR) of the Department of Justice.”³⁹ The Asylum Officer Corps adjudicates asylum claims that are filed with the USCIS.⁴⁰ An Asylum Officer decides whether an applicant meets the refugee definition and whether the applicant is barred for other reasons.⁴¹ Examples of circumstances barring applicants from achieving asylee status include engaging in crimes or persecuting others in the past, posing a threat to national security, or “firmly resettling in another country before coming to the United States.”⁴²

32. Martin & Hoefler, *supra* note 1, at 2.

33. *Id.*

34. *Id.*

35. Title 8 U.S.C. § 1101(a)(3) defines an alien as “any person not a citizen or national of the United States.” *Hughes v. Ashcroft*, 255 F.3d 752, 755 (9th Cir. 2001).

36. Martin & Hoefler, *supra* note 1, at 2.

37. See *Obtaining Asylum in the United States: 2 Paths*, U.S. Citizenship and Immigration Service, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=e3f26138f898d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=3a82ef4c766fd010VgnVCM1000000ecd190aRCRD>.

38. Martin & Hoefler, *supra* note 1, at 4.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

Both refugees and asylees are authorized to work in the United States once they achieve their new legal status.⁴³

B. Asylum Claim Appeal Process

In order to obtain asylum affirmatively in the United States, an alien must be physically present in the United States at the time of application.⁴⁴ Every alien wishing to apply for affirmative asylum must submit Form I-589 (Application for Asylum and for Withholding Removal) to USCIS.⁴⁵ Moreover, the alien must apply within one year of his or her arrival, unless he can demonstrate that the delay of filing is supported by a change in circumstances and the application was filed within a reasonable amount of time.⁴⁶ If the alien's case is not approved, USCIS will issue a Form I-862 (Notice to Appear) and the case will be referred to the Executive Office for Immigration Review (EOIR).⁴⁷ A judge from EOIR will conduct a hearing using the "de novo" standard and issue an independent decision.⁴⁸ However, if EOIR does not have jurisdiction, the Asylum Office will issue Notice of Referral to Immigration Judge for an asylum hearing, using Form I-863.⁴⁹ While the affirmative asylum application is pending, aliens are permitted to remain within the United States and are generally not detained by ICE while awaiting

43. Martin & Hofer, *supra* note 1, at 2-4. Asylees and refugees are included in a protected class, among U.S. citizens, lawful permanent residents and temporary residents and therefore possess "indefinite and unrestricted work authorization for employment in the United States." Reginald C. Govan, *Advanced Corporate Compliance and Ethics Workshop 2009*, 1776 PLI/Corp 433, 460 (2009).

44. *Obtaining Asylum in the United States*, U.S. Citizenship and Immigration Services, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=dab9f067e3183210VgnVCM100000082ca60aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD>.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Obtaining Asylum in the United States*, *supra* note 44.

an Immigration Judge's decision.⁵⁰ Nevertheless, most asylum applicants are not authorized to work at this time.⁵¹

In the present case, Nken applied for asylum withholding removal—which is a defensive application for asylum—after his affirmative asylum application was denied.⁵² In that case, an alien must be involved in removal proceedings with the EOIR.⁵³ There are two paths to placing an alien in the defensive asylum process.⁵⁴ First, if it is determined that the alien is ineligible for asylum, an alien may be referred by a USCIS Immigration Judge.⁵⁵ Second, defensive asylum may occur when an alien has been apprehended without proper legal documents in the United States or if the alien was caught attempting to enter the United States without proper identification and an Asylum Officer finds the alien to have a “credible fear of persecution or torture.”⁵⁶ Defensive asylum cases are held before an Immigration Judge in an adversarial proceeding, where both the Government (represented by an ICE attorney) and the alien have the opportunity to present their arguments.⁵⁷ After the Immigration Judge hears both sides, he decides if the alien is eligible for asylum or not.⁵⁸ An eligible alien obtains asylum status, but an Immigration Judge may order an ineligible alien to be removed or, in some cases, determine other forms of relief.⁵⁹ Either party may appeal the Immigration Judge's decision.⁶⁰ Appellate administrative decisions

50. *Id.*

51. *Id.*

52. *See Nken*, 129 S. Ct. at 1754; *Obtaining Asylum in the United States*, *supra* note 44.

53. *Obtaining Asylum in the United States*, *supra* note 44.

54. *Id.*

55. *Id.*

56. *Id.*; *see also Questions & Answers: Credible Fear Screening*, U.S. Citizenship and Immigration Services, available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=897f549bf0683210VgnVCM100000082ca60aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD>.

57. *Obtaining Asylum in the United States*, *supra* note 44.

58. *Id.*

59. *Id.*

60. *Id.*

are issued by the Board of Immigration Appeals (BIA).⁶¹ These decisions are binding on Department of Homeland Security (DHS) officers and Immigration Judges.⁶² Although the BIA is not considered a federal court, its decisions may be reviewed by federal courts.⁶³ The BIA mostly hears appeals regarding removal orders and applications for relief from removal.⁶⁴ Finally, if the alien's federal court of appeals appeal is denied, his last resort is the United States Supreme Court.⁶⁵

C. Changes to the Judicial Review Process

1. The Language of the INA and Automatic Stays Under Former § 1105a⁶⁶

IIRIRA was intended to repeal and amend numerous sections of the INA, "including the provision on reinstatement of orders of deportation for those who illegally reenter the United States."⁶⁷ Specifically, subsection (f)(2) of IIRIRA repeals subsection 242(f)(2) of the INA.⁶⁸ The section of the INA that directly precedes INA § 242(f)(2) states that the Supreme Court has exclusive jurisdiction to

61. *BIA Decisions*, U.S. Citizenship and Immigration Services, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=f2c29c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextchan nel=f2c29c7755cb9010VgnVCM10000045f3d6a1RCRD>.

62. *Id.*

63. *Id.*; see also Joseph Rikhof, *War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon Of International Crimes in the Immigration and Refugee Context*, 21 INT'L J. REFUGEE L. 453, 494 (2009).

64. *Board of Immigration Appeals*, United States Department of Justice, available at www.justice.gov/eoir/biainfo.htm.

65. Carol M. Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 HASTINGS RACE & POVERTY L.J. 235, 248 (2007).

66. Immigration and Nationality Act, 8 U.S.C. § 1105a (1994). See also Immigration and Nationality Act, 8 U.S.C. § 1101 (2009).

67. *Arevalo v. Ashcroft*, 344 F.3d 1, 4 (1st Cir. 2003); see IIRIRA § 305(a)(3) (codified as amended at INA § 241, 8 U.S.C. § 1231 (2002)) (replacing INA § 242(f), 8 U.S.C. § 1252(f)). The court in *Arevalo* notes that the above changes were effective on April 1, 1997. *Arevalo*, 344 F.3d at 4-5; see IIRIRA § 309(a).

68. *Arevalo*, 344 F.3d at 7.

“to enjoin or restrain the operation of the provisions of [this subchapter].”⁶⁹

Moreover, prior to the enactment of IIRIRA, under former section 1105a,⁷⁰ court of appeals judges did not have the authority to review a deportation order for aliens who departed the United States.⁷¹ Under this section, aliens were entitled to automatic stays of removal until judicial review was finished.⁷² The purpose of former section 1105a was to reduce judicial review of deportation orders for aliens abusing the judicial system.⁷³

69. *Id.* (citing INA § 242(f)(1) (8 U.S.C. § 1252(f)(1)) (2003)). The significance in difference between the use of “restrain or enjoin” and merely the term “enjoin” will be discussed throughout this note.

70. Immigration and Nationality Act, 8 U.S.C. § 1105a (1994).

71. *See Nken*, 129 S. Ct. at 1755. *See also* 8 U.S.C. § 1105a (1994) (“An order of deportation or of exclusion shall not be reviewed by any court . . . if [the alien] has departed from the United States after the issuance of the order.”).

72. Former section 1105a “provid[ed that] most aliens [were entitled to] . . . an automatic stay of their removal order while judicial review was pending.” *See Nken*, 129 S. Ct. at 1755 (citing 8 U.S.C. § 1105a(a)(3) (“The service of the petition for review . . . shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs”). *See also* *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 475-76 (1999).

Before enactment of IIRIRA, judicial review of most administrative action under the INA was governed by 8 U.S.C. § 1105a, a special statutory-review provision directing that ‘the sole and exclusive procedure for . . . the judicial review of all final orders of deportation’ shall be that set forth in the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, which gives exclusive jurisdiction to the courts of appeals.

Id.

73. *Foti v. Immigration & Naturalization Service*, 375 U.S. 217, 224 (1963) (citing Immigration and Nationality Act, § 106, as added by § 5(a) of Public Law 87-301, approved September 26, 1961, 75 Stat. 651, 8 U.S.C. (Supp. IV, 1962) § 1105a). The Supreme Court stated in this case that the purpose of the section was “to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts.” *Foti*, 375 U.S. at 224. The Court explained that Congress “has been disturbed in recent years to observe the growing frequency of judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country.” *Id.* at 225.

2. The New Test: IIRIRA⁷⁴

Nevertheless, when Congress enacted IIRIRA in 1996, the Act produced several important changes, not the least of which was the repealing of section 1105a.⁷⁵ First, courts of appeals are permitted to adjudicate a petition for review once an alien leaves the United States.⁷⁶ Second, subsection (b)(3)(B) of IIRIRA disposed of the previous automatic stay presumption.⁷⁷ The third relevant change made by IIRIRA is under subsection (f)(2), which states that “no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.”⁷⁸

74. 8 U.S.C. § 1252 (2005).

75. *Reno*, 525 U.S. at 475, 502 (“Congress passed IIRIRA which, *inter alia*, repealed the old judicial-review scheme set forth in § 1105a and instituted a new (and significantly more restrictive) one in 8 U.S.C. § 1252.”).

76. *Nken*, 129 S. Ct. at 1755 (citing IIRIRA § 360(b), 110 Stat. 3009-612) (repealing § 1105a). Under §306(b) of IIRIRA,

A petition for review filed under former section 106(a) of the Immigration and Nationality Act (as in effect before its repeal by section 306(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1252 note)) shall be treated as if it had been filed as a petition for review under section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252), as amended by this section. 306(b), 110 Stat. 3009-612 (repealing § 1105a).

H.R. 1268, 109th Cong., Pub. L. 109-13, 119 Stat. 231 (2005) (codified at 8 U.S.C. § 1252). *See also Nken*, 129 S. Ct. at 1755.

77. *See generally* 8 U.S.C. §1252(b)(3)(B) (2006) (“Service of the petition on the officer or employee does not stay the removal of an alien pending the court’s decision on the petition, unless the court orders otherwise.”). *See also Nken*, 129 S. Ct. at 1755.

78. 8 U.S.C. § 1252. Subsection (f)(2) of IIRIRA provides: “Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.” 8 U.S.C. § 1252 (f)(2).

D. Competing Standards

The main issue in the *Nken* case is the determination of which standard applies to a stay of removal.⁷⁹ The Government argues that the standard under subsection (f)(2) of IIRIRA governs.⁸⁰ The petitioner, *Nken*, claims that the “traditional” standard regarding stays controls this case because subsection (f)(2) applies to injunctions only.⁸¹ Therefore, it is important to discuss the difference between the traditional test and the subsection (f)(2) standard.

1. The “Traditional Standard” for Stays

In general, when a petition for review is filed, no automatic stay is permissible.⁸² Rather, an appellant, such as *Nken*, must make a motion to obtain a stay pending adjudication so that the judgment or order in question is not enforced immediately.⁸³ “Different Rules of Procedure govern the power of district courts and courts of appeals to stay an order pending appeal.”⁸⁴ Federal Rule of Appellate Procedure 8(a), entitled “Motion for Stay,” states that a “party must ordinarily move first in the district court for . . . a stay of the judgment.”⁸⁵ However, “[a] motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.”⁸⁶ Moreover, Federal Rule of Civil Procedure 62 permits automatic stays and grants the appellate court the power to stay proceedings.⁸⁷

79. *Nken*, 129 S. Ct. at 1756.

80. *Id.*

81. *Id.*

82. John Y. Gotanda, *The Emerging Standards for Issuing Appellate Stays*, 45 BAYLOR L. REV. 809, 810 (1993) (citing FED. R. APP. P. 8).

83. Gotanda, *supra* note 82, at 810 (citing 28 U.S.C. § 1651 (1988), FED. R. CIV. P. 62(g), FED. R. APP. P. 8).

84. *Hilton*, 481 U.S. at 776.

85. FED. R. APP. P. 8(a)(1).

86. FED. R. APP. P. 8(b)(1). *See also* Gotanda, *supra* note 82, at 811 (“If . . . a party can demonstrate that it is not practicable to seek relief before the lower tribunal, an application for stay may be made directly to the court of appeals.”).

87. FED. R. CIV. P. 62. This rule provides:

(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings. Except as stated in this rule, no

Before IIRIRA, the governing standard for stays was under the *Hilton v. Braunskill* Court,⁸⁸ referred to as the “traditional” standard for a stay.⁸⁹ Under the “traditional” stay standard, a court should consider four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether

execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

- (1) an interlocutory or final judgment in an action for an injunction or a receivership; or
 - (2) a judgment or order that directs an accounting in an action for patent infringement.
- (b) Stay Pending the Disposition of a Motion. On appropriate terms for the opposing party's security, the court may stay the execution of a judgment--or any proceedings to enforce it--pending disposition of any of the following motions:
- (1) under Rule 50, for judgment as a matter of law;
 - (2) under Rule 52(b), to amend the findings or for additional findings;
 - (3) under Rule 59, for a new trial or to alter or amend a judgment; or
 - (4) under Rule 60, for relief from a judgment or order.
- (c) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:
- (1) by that court sitting in open session; or
 - (2) by the assent of all its judges, as evidenced by their signatures.
- ...
- (g) Appellate Court's Power Not Limited. This rule does not limit the power of the appellate court or one of its judges or justices:
- (1) to stay proceedings--or suspend, modify, restore, or grant an injunction--while an appeal is pending

FED. R. CIV. P. 62.

88. *Hilton*, 481 U.S. at 776.

89. *See Nken*, 129 S. Ct. at 1756.

issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.”⁹⁰

2. “Clear and Convincing Evidence” Standard under Subsection (f)(2)⁹¹

Under subsection (f)(2) of IIRIRA (“subsection (f)(2)”), the relevant standard for injunctions is the “clear and convincing evidence” standard.⁹² Under this standard, an alien must demonstrate that executing the order at issue is “prohibited as a matter of law” by “clear and convincing evidence” in order for that order to be “enjoin[ed].”⁹³ Hence, IIRIRA “substantially limited the availability of judicial review and streamlined all challenges to a removal order into a single proceeding: the petition for review.”⁹⁴ The case at hand discusses whether subsection (f)(2) pertains to stays as well as injunctions or whether it only applies to injunctions.⁹⁵

E. Case Law: Jurisdictional Split in Courts of Appeals

The key issue in the present case, as will be discussed in the Analysis section of this note, is what standard applies to stays.⁹⁶ In determining which standard to apply to situations such as this one, where a stay of removal is requested, the U.S. Courts of Appeals were split until the outcome of the present case. Although some circuits held that the term “enjoin” is used broadly to encompass a “stay”—so that the IIRIRA standard applies both to stays and injunctions—other circuits held that injunctions and stays are

90. *Hilton*, 481 U.S. at 776.

91. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(f)(2).

92. 8 U.S.C. § 1252(f)(2) (2005)

93. See 8 U.S.C. § 1252(f)(2). By passing IIRIRA, Congress “repealed the old judicial-review scheme set forth in [8 U.S.C.] § 1105a and instituted a new (and significantly more restrictive) one in 8 U.S.C. § 1252.” *Nken*, 129 S. Ct. at 1755 (citing *Reno*, 525 U.S. at 940).

94. *Nken*, 129 S. Ct. at 1755.

95. See generally *id.*

96. See *infra* notes 147-231 and accompanying text.

separate and different, applying different standards to stays and injunctions.⁹⁷

1. Cases Using A Broad Interpretation of Term “Enjoin”

The Court in the present case disagreed with Fourth and Eleventh Circuits, which held that the term “injunction” in IIRIRA includes “stays” and, therefore, the IIRIRA standard should pertain to cases such as this one.

The Fourth Circuit held in *Teshome-Gebreegziabher v. Mukasey* that subsection (f)(2) of IIRIRA “employs the broad term ‘enjoin,’ which plainly includes the narrower term ‘stay.’”⁹⁸ The court reasoned that given that the term “enjoin” is not clearly defined in IIRIRA, it is necessary to “accord the term its ‘ordinary, contemporary, common meaning, absent an indication Congress intended [it] to bear some different import.’”⁹⁹ Turning to the customary use of dictionaries to resolve such disputes, the court in *Teshome-Gebreegziabher* followed with the pertinent definitions, explaining that “enjoin” is requires a person “to perform, or to abstain or desist from, some acts,” while a “stay” is “a suspension of the case or some designated proceedings within it. It is a kind of injunction with which a court freezes its proceedings at a particular point.”¹⁰⁰ A comparison of these definitions results in a conclusion that a stay is part of the broader category of injunctions.¹⁰¹ The court concluded the topic by stating that, “[w]e are hesitant to interpret a statute so as to bolster our own power in the face of a deliberate congressional allotment of authority to another branch.”¹⁰²

The Eleventh Circuit held that injunctions encompass stays and therefore the subsection (f)(2) standard applies to the alien’s stay of removal motion.¹⁰³ The court rejected the notion that the term “enjoin” is “limited to permanent injunctive relief and cannot

97. See generally *infra* notes 98-118 and accompanying text.

98. *Teshome-Gebreegziabher*, 528 F.3d 330, 334 (4th Cir. 2008).

99. *Id.* (citing *DIRECTV, Inc. v. Nicholas*, 403 F.3d 223, 225 (4th Cir. 2005)).

100. *Teshome-Gebreegziabher*, 528 F.3d at 333-34.

101. *Id.* at 334.

102. *Id.*

103. *Weng v. U.S. Atty. Gen.*, 287 F.3d 1335, 1338-39 (11th Cir. 2002).

encompass temporary motions for stays” because the court held that the plain meaning of the term “enjoin” did not support such an interpretation.¹⁰⁴ Moreover, the court contrasted subsection (f)(1) of IIRIRA with subsection (f)(2), explaining that the first “prohibits the use of injunctive relief against entire provisions of immigration law,” while subsection (f)(2) deals only with enjoining in removal situations.¹⁰⁵ Hence, the court reasoned that the broad term “restrain,” which without argument in the court’s view would include both injunctions and stays, would not apply in subsection (f)(2) for removal situations.¹⁰⁶ This is because “injunctive relief grants the very affirmative relief sought by aliens instead of merely preserving the status quo.”¹⁰⁷ The Eleventh Circuit ultimately stated that “Congress chose the broad word ‘enjoin’ in § 1252(f)(2) against a specific and consistent backdrop of case law—both generally and in immigration law—interpreting stays as injunctive relief and did not exclude them or include any limiting language in § 1252(f)(2).”¹⁰⁸

2. Cases Using A Broad Interpretation of Term “Enjoin”

The First, Second, Third, Sixth, Seventh, and Ninth Circuits disagreed with the reasoning of the Fourth and Eleventh Circuits and held in contrast that subsection (f)(2) of IIRIRA does not pertain to stays. The First Circuit began its inquiry by looking to the language of the statutes at issue, contrasting the INA § 242(f)(2), which grants jurisdiction to the Supreme Court “to enjoin or restrain the operation of the provisions of [this subchapter],” with IIRIRA’s subsection (f)(2) which utilizes the term “enjoin” alone.¹⁰⁹ The court reasoned that this “linguistic shift” suggests that Congress’s intent was to give separate meanings to the terms “enjoin” and “stay.”¹¹⁰ Thus, this court concluded that the “most sensible way to give operative effect to both words in this statutory scheme is to treat the word ‘enjoin’ as

104. *Id.* at 1339.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Weng*, 287 F.3d at 1339.

109. *Arevalo*, 344 F.3d at 7 (citing INA § 242(f)(1); 8 U.S.C. § 1252(f)(1)) (2003)).

110. *Arevalo*, 344 F.3d at 7.

referring to permanent injunctions and the word 'restrain' as referring to temporary injunctive relief (such as a stay)."¹¹¹

The Second Circuit used similar reasoning in *Mohammed v. Reno*, emphasizing the change from using "enjoin or restrain" in the INA subsection 242(f)(1) and merely "enjoin" in IIRIRA's subsection (f)(2).¹¹² The Third Circuit cited *Mohammed* in supporting its logic that subsection (f)(2) of IIRIRA did not apply and that, therefore, the "traditional" test would apply to a case involving a stay of removal.¹¹³ The Fifth Circuit cited circuits on both sides of the issue, but ultimately held that because subsection (b)(3)(B) of IIRIRA, which discusses stays, does not mention the standard from subsection (f)(2), Congress intended to use the distinct terms "stay" and "enjoin" for these sections because subsection (f)(2) was not intended to embrace stays.¹¹⁴ The Sixth Circuit sided with the same reasoning, and refused to apply IIRIRA's subsection (f)(2) standard to a stay of removal.¹¹⁵ The Seventh Circuit admitted that despite a "functional overlap" between stays and injunctions, the "words nonetheless cover different domains."¹¹⁶ The Seventh Circuit cryptically offered the following explanation:

Perhaps the distinction between injunctions and stays rests more on history than on function-especially when the stay's addressee is an agency rather than another judge. Still, it is a long-standing distinction,

111. *Id.* (citing similar reasoning in the Hobbs Act, 28 U.S.C. § 2349(a)-(b)).

112. *Mohammed v. Reno*, 309 F.3d 95, 99 (2d Cir. 2002).

113. *Douglas v. Ashcroft*, 374 F.3d 230, 234 (3d Cir. 2004).

114. *Tesfamichael v. Gonzales*, 411 F.3d 169, 174-75 (5th Cir. 2005).

115. *Bejjani v. I.N.S.*, 271 F.3d 670, 687-88 (6th Cir. 2001).

116. *Hor v. Gonzales*, 400 F.3d 482, 484 (7th Cir. 2005). More specifically, an:

'injunction' is an order issued as the relief in independent litigation, while a 'stay' is an order integral to a system of judicial review: an appellate court may stay a district judge's order, or its own mandate, or an agency's decision when the agency plays the role of the district court and the initial judicial tribunal is a court of appeals.

Id.

reflected not only in 8 U.S.C. § 1252 but also in Fed. R. App. P. 18 and 28 U.S.C. § 2349, which govern the issuance of ‘stays’ pending appellate review of federal agencies’ decisions.¹¹⁷

Finally, the Ninth Circuit concurred with the previously stated reasoning, beginning its analysis in *Andreiu v. Ashcroft* by stating: “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”¹¹⁸ The court reminds us that because the statute preceding IIRIRA subsection (f)(2) used the term “enjoin or restrain,” Congress did not view the terms as synonymous.¹¹⁹ Therefore, “or restrain” would be “mere surplusage” if the term “enjoin” was originally intended to “cover the entire universe of judicial power over immigration proceedings.”¹²⁰ The Ninth Circuit next discussed the separate mention of stays in subsection (b)(3)(B), which the court found to be a compelling suggestion of Congress’s intent to separate stays from injunctions.¹²¹ Next, the court pointed to the heading of subsection (f)(2), which is entitled “[l]imit on injunctive relief,” rather than a more broad term such as “enjoin or restrain.”¹²² Ultimately, the court suggested that when Congress had already discussed stays separately from injunctions, Congress knew when it was necessary to use the term “stay.”¹²³ Hence, the Ninth Circuit ended its discussion by stating that subsection (f)(2) does not limit judicial power to stay deportation

117. *Id.*

118. *Andreiu v. Ashcroft*, 253 F.3d 477, 480 (9th Cir. 2001) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987)).

119. *Andreiu*, 253 at 480.

120. *Id.*

121. *Id.* at 480-81. The court adds that the most logical setting to discuss limiting judicial authority in terms of staying deportation or removal orders pending adjudication would have been under subsection (b)(3)(B), which specifically discusses stays. *Id.* at 481.

122. *Id.*

123. *Id.* at 482 (“Congress knew very well how to use the term ‘stay’ when it wanted to, and it is not plausible that here, and only here, Congress meant ‘enjoin’ to include the entire universe of court actions that have a prohibiting or restraining effect.”).

orders pending review, that such an argument is contrary to logic and justice, citing a judge's words from a previous dissent regarding the same immigrant to support its point.¹²⁴

III. FACTS

In April 2001, Cameroon citizen Jean Mark Nken entered the United States with a transit visa.¹²⁵ He applied for asylum in December 2001 under 8 U.S.C. § 1158, to withhold removal under § 1231(b)(3), and to defer removal under the Convention Against

124. The court states:

To hold otherwise, as Judge [Sidney] Thomas noted, would mean that 'thousands of asylum seekers who fled their native lands based on well-founded fears of persecution will be forced to return to that danger under the fiction that they will be safe while waiting the slow wheels of American justice to grind to a halt.'

Id. at 484. (citing *Andrieu v. Reno*, 223 F.3d 1111, 1127-28 (9th Cir. 2000) (Thomas, J., dissenting)).

125. *Nken*, 129 S. Ct. at 1754. Transit visas are granted to aliens who come to the United States in transit to other countries or to the United States under section 101(a)(15)(C) of INA. Steven C. Bell, *PLI Continuing Legal Assistant Training (R) Workshop for Legal Assistants 1994: Basic Immigration Procedures*, 500 PLI/LIT 43, 55 (1994) (citing 8 U.S.C. § 1101(a)(15)(C)). This section, which grants non-immigrant status to aliens, is divided into three parts. Bell, *supra*, at 55. Under subcategory C-1, "alien[s] in immediate and continuous transit through the United States" are granted a transit visa if they have a ticket or "assurance of transportation" to their final destination, have "sufficient funds" for their travels, or have permission to enter the destination. *Id.* at 55-56. C-2 is reserved for aliens desiring to enter the United Nations on official business, defined within a twenty-five mile radius of New York City's Columbus Circle. *Id.* at 56. Finally, subcategory C-3 is for government officials from foreign countries wishing to pass through the United States on their way to another country. *Id.* Aliens must apply for transit visas at a U.S. consulate using State Department Form OF-156, although foreign government officials generally require a "note" from their country's foreign office. *Id.* Typically, category C aliens may stay in the United States up to twenty-nine days. *Id.* at 56-57 (citing C.F.R. § 214.2(c)(3) (1992)). Moreover, aliens entering the United States under a transit visa may not change their non-immigrant category upon arriving in the United States. Bell, *supra*, at 57. However, aliens are sometimes granted permanent resident status under § 245 of the INA, 8 U.S.C. § 1255. *Id.* This is unlikely, however, because an alien attempting to change their status in this manner must "overcome the suspicion that he or she had the preconceived intent to seek permanent residence upon admission in C status." *Id.*

Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.¹²⁶ He claimed that he was being persecuted for protesting against the government of Cameroon, and that if he returned to Cameroon he would be subjected to further persecution.¹²⁷

According to Nken's application, he was persecuted after participating in student protests against his government in 1990 (before he left to study in Cote D'Ivoire).¹²⁸ Nken stated that upon returning to Cameroon in 2000, he was imprisoned and beaten because of his involvement in the protests.¹²⁹ He was released after 30 days, and left Cameroon soon thereafter.¹³⁰ Upon his release Nken visited the Bahamas for a medical conference.¹³¹ Two months later, on his way back to Cameroon, he entered the United States and chose to remain instead of returning to Cameroon.¹³²

126. *Nken*, 129 S. Ct. at 1754; see also Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"), art. 3, S. Treaty Doc. No. 100-20, p. 20, 1465 U.N.T.S. 85, see 8 C.F.R. § 208.17 (2008). CAT, which was ratified in 1990, "provides a federal cause of action for damages 'against any individual who, under actual or apparent authority or under color of law of any foreign nations, subjects any individual to torture or extrajudicial killing.'" Pamela Stephens, *Applying Human Rights Norms to Climate Change: the Elusive Remedy*, 21 COLO. J. INT'L ENVTL. L. & POL'Y 49, 83 n.125 (2010) (citing Pamela J. Stephens, *Beyond Torture: Enforcing International Human Rights in Federal Courts*, 51 SYRACUSE L. REV 941, 953 (2001). Before having a legitimate CAT cause of action, claimants must first exhaust their remedies "in the place in which the conduct giving rise to the claim occurred." Stephens, *supra*, at 82 n.125.

127. *Nken*, 129 S. Ct. at 1754. See also Cameroon Country Profile, BBC, available at http://news.bbc.co.uk/2/hi/africa/country_profiles/1042937.stm#media.

128. See also *Nken v. Mukasey* (08-681), Cornell University Law School, LII Legal Information Institute, LIIBULLETIN, available at <http://topics.law.cornell.edu/supct/cert/08-681>.

129. *Id.*

130. *Id.*

131. Brief for the Respondent at 4, *Nken*, 129 S.Ct.1749 (No. 08-681).

132. *Id.*; see also *Nken v. Mukasey* (08-681), Cornell University Law School, LII Legal Information Institute, LIIBULLETIN, available at <http://topics.law.cornell.edu/supct/cert/08-681>.

After applying for asylum, Nken was first denied relief by an Immigration Judge who concluded that Nken was not credible.¹³³ After Nken appealed the Immigration Judge's decision, the BIA affirmed.¹³⁴ The BIA declined to remand his application for adjustment of status, notwithstanding the fact that Nken married an American citizen, which sometimes changes an alien's chances of obtaining asylum.¹³⁵ Nken married U.S. citizen Brigitte Beloeck on November 4, 2004, and "filed an I-130 Petition for Alien Relative on November 17, 2004, seeking lawful resident status for Nken on the basis of his lawful marriage to a U.S. citizen."¹³⁶ After his motion to

133. See *id.* "Finding that documents Nken submitted to prove the risk he would face upon returning to Cameroon were not authenticated and only worth "de minimus weight." *Id.* Numerous discrepancies existed and the Immigration Judge found the story to be "vague and improbable." *Id.*

134. *Nken*, 129 S. Ct. at 1754.

135. See also *Nken v. Mukasey* (08-681), Cornell University Law School, LII Legal Information Institute, LIIBULLETIN, available at <http://topics.law.cornell.edu/supct/cert/08-681>.

136. *Nken v. Mukasey* (08-681), Cornell University Law School, LII Legal Information Institute, LIIBULLETIN, available at <http://topics.law.cornell.edu/supct/cert/08-681>. Although non-citizens are sometimes granted residency and U.S. citizenship upon marrying an American, as Nken did in the present case, this is not automatic. The requirements for obtaining permanent residency status for aliens who are spouses of U.S. citizens are enumerated under 8 U.S.C. § 1186a. First, 8 U.S.C. § 1186a(a)(1) provides: "Notwithstanding any other provision of this chapter, an alien spouse . . . shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section." 8 U.S.C. § 1186a(a)(1). However, 8 U.S.C. § 1186a(b)(1) touches on when an alien's permanent resident status terminates, stating:

In the case of an alien with permanent resident status on a conditional basis under subsection (a) of this section, if the Attorney General determines, before the second anniversary of the alien's obtaining the status of lawful admission for permanent residence, that--

(A) the qualifying marriage--

- (i) was entered into for the purpose of procuring an alien's admission as an immigrant, or
- (ii) has been judicially annulled or terminated, other than through the death of a spouse; or

reopen the matter was denied, “Nken filed a petition for review of the BIA’s removal order in the Court of Appeals for the Fourth Circuit,” which was denied.¹³⁷ He next filed a second motion to reopen, and a second petition for review, which were both denied.¹³⁸

Nken subsequently filed for a third motion to reopen, stating that circumstances had changed in Cameroon making his persecution there more likely.¹³⁹ This was denied because the BIA found that Nken did not present “sufficient facts or evidence of changed country

(B) a fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 1154(a) of this title or subsection (d) or (p) of section 1184 of this title with respect to the alien; the Attorney General shall so notify the parties involved and, subject to paragraph (2), shall terminate the permanent resident status of the alien (or aliens) involved as of the date of the determination.

8 U.S.C. § 1186a(b)(1).

Moreover, “noncitizens whose permanent residence status arises from their marriage to a U.S. citizen are subject to a two-year period of conditional residency.” Juliet Stumpf, *Fitting Punishment*, 66 Wash. & Lee L. Rev. 1683, 1741 n.103 (2009) (citing INA § 216(b)(1), 8 U.S.C. § 1186a(b)(1)). After the two-year period is over, “the noncitizen is removable unless she files jointly with her spouse a petition to remove the conditional aspect of her residency and successfully passes an interview with an immigration officer.” Stumpf, *supra*, at 1741 n. 103 (citing INA § 216(c)(1), 8 U.S.C. § 1186a(c)(1)). However, the alien may waive the joint filing requirement if he can demonstrate:

(a) that deportation would cause extreme hardship due to factors arising only within the two-year conditional period; (b) that she entered into the marriage in good faith but it was either terminated (except by death of her spouse) or her spouse battered her or her child or subjected her or her child to extreme cruelty; and (c) she was not at fault in failing to file jointly.

Stumpf, *supra*, at 1741 n. 103 (citing INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4)). Although the Court does not discuss the reasoning behind not granting permanent residency status to Nken after his marriage to an American woman, it is likely he did not qualify as a result of the statutes discussed in this footnote.

137. *Nken*, 129 S. Ct. at 1754.

138. *Id.*

139. *Id.*

conditions.”¹⁴⁰ Nken sought review of this decision in the Court of Appeals and “moved to stay his deportation pending resolution of his appeal.”¹⁴¹ Nken conceded that the standard governing an alien’s attempt to stay a removal order in the Fourth Circuit “required . . . an alien . . . to show by ‘clear and convincing evidence’ that the order was ‘prohibited as a matter of law,’” under subsection (f)(2) of IIRIRA.¹⁴² However, Nken argued that this standard did not govern.¹⁴³ “The Court of Appeals denied Nken’s motion without comment.”¹⁴⁴ Nken applied to the United States Supreme Court for a stay of removal pending review, “ask[ing] in the alternative that [the Supreme Court] grant certiorari to resolve a split among the Courts of Appeals on what standards governs a request for such a stay.”¹⁴⁵ The Supreme Court, in *Nken v. Mukasey*, granted certiorari and stayed Nken’s removal pending a further order by the Court.¹⁴⁶

IV. ANALYSIS OF COURT’S OPINION

A. Chief Justice Roberts’s Majority Opinion¹⁴⁷

Beginning his opinion, Chief Justice Roberts immediately highlights the importance of time in the appeals process.¹⁴⁸ He reminds his reader that, in considering appeals, “[n]o court can make time stand still.”¹⁴⁹ Nevertheless, Justice Roberts adds that a party might suffer harm if the court takes the time necessary to make an

140. *Id.*

141. *Id.*

142. *Nken*, 129 S. Ct. at 1754.

143. *Id.*

144. *Id.*

145. *Id.* at 1755.

146. *Id.*

147. *Nken*, 129 S. Ct. at 1753-54. The Court’s majority opinion is authored by Justice Roberts, and joined by Justices Stevens, Scalia, Kennedy, Souter, Ginsberg, and Breyer. *Id.*

148. *Id.* at 1754. “It takes time to decide a case on appeal. Sometimes a little; sometimes a lot.” *Id.*

149. *Id.* (citing *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9 (1942)).

informed decision, but the decision comes too late.¹⁵⁰ The majority frames the solution by revealing the traditional reasoning behind a stay:¹⁵¹ to give appellate courts sufficient time to review a case by putting enforcement of the action at issue on hold until the appeal is complete.¹⁵²

The Court identifies the issue of the case as whether the standard for appellate review is controlled by “a statutory provision that sharply restricts the circumstances under which a court may issue an injunction blocking the removal of an alien from this country” or whether traditional stay rules apply.¹⁵³ The majority holds that stays are controlled by the traditional test, which necessitates vacating and remanding the case to adhere to this ruling.¹⁵⁴ The Court sets forth a short statement of the facts in Part One.¹⁵⁵ Part Two of the opinion presents the statute at issue, subsection (f)(2) of IIRIRA, and its effect on the traditional automatic stay rights of aliens, that existed before IIRIRA was established, while their cases awaited judicial review.¹⁵⁶

In Part Three of the opinion, the Court states the parties’ opposing viewpoints on the governing standard.¹⁵⁷ Justice Roberts

150. “No court can make time stand still” while it considers an appeal . . . and if a court takes the time it needs, the court’s decision may in some cases come too late for the party seeking review.” *Nken*, 129 S. Ct. at 1754.

151. “That is why it ‘has always been held, . . . that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal.’” *Id.* (citing *Scripps-Howard Radio, Inc.*, 316 U.S. at 9-10).

152. “A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it.” *Nken*, 129 S. Ct. at 1754. In other words, the reasoning is that a stay should be granted to provide appellate courts with sufficient time to decide a case on the merits, rather than rushing its a decision.

153. *Id.* By using this language, the Court first suggests that a key distinction exists between an injunction and a stay.

154. *Id.*

155. *Id.* at 1754-55.

156. *Id.* at 1755-56.

157. *Nken*, 129 S. Ct. at 1756. *Nken* contends that the “traditional” standard applies, *Id.* (citing *Hilton*, 481 U.S. at 776). The Government disputes this argument, asserting that a stay is merely a type of injunction— or that the relief sought is injunctive in nature— and therefore subsection (f)(2) of IIRIRA applies to the case at hand. *Id.*

concludes that the traditional stay factors apply after interpreting the language, specific context, and broad context of IIRIRA.¹⁵⁸ In Subpart A, the majority describes the traditional inherency and importance of the appellate court's power to stay an order.¹⁵⁹ However, the section reminds the reader that despite this strong tradition, a stay is not a right, as it encroaches on everyday judicial review practices,¹⁶⁰ and because the public is entitled to orders being carried out without delay.¹⁶¹

In Subpart B of Part Three, Chief Justice Roberts contrasts the meaning of the term "enjoin" in subsection (f)(2) of IIRIRA with the term "stay."¹⁶² The Court notes that, "an injunction¹⁶³ and a stay¹⁶⁴

158. *Id.* (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (holding that statutory interpretation rests on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.")).

159. *Nken*, 129 S. Ct. at 1756-57. The Court states that, "[a]n appellate court's power to hold an order in abeyance while it assesses the legality of the order has been described as 'inherent,' preserved in the grant of authority to federal courts to 'issue all writs necessary or appropriate in aid of their respective jurisdictions.'" *Id.* at 1756 (citing All Writs Act, 28 U.S.C. § 1651(a) (2007)). Moreover, the Court cites *Scripps-Howard*, which held that despite Congress's failure to expressly bestow the power of appellate review in a statute, the statute should not be interpreted as absolutely denying that power. *Nken*, 129 S. Ct. at 1756 (citing *Scripps-Howard*, 316 U.S. at 4). The majority points to the fact that the *Scripps-Howard* Court neither decided what "criteria" should control the court's power of stay, nor the conditions for Congress to deny that power. *Nken*, 129 S. Ct. at 1757 (citing *Scripps-Howard*, 316 U.S. at 17). Instead, the Court in *Scripps-Howard* described the appellate court's "power to grant a stay pending review . . . as part of a court's 'traditional equipment for the administration of justice.'" *Nken*, 129 S. Ct. at 1757 (citing *Scripps-Howard*, 316 U.S. at 9-10). Furthermore, the Court stresses that this authority to grant a stay is "firmly imbedded in our judicial system," "consonant with the historic procedures of federal appellate courts," and "a power as old as the judicial system of the nation." *Nken*, 129 S. Ct. at 1757 (citing *Scripps-Howard*, 316 U.S. at 13, 17). Therefore, before delving into an analysis of IIRIRA's authority over stays, the Court expounds the strong tradition that gives weight to the appellate court's power to grant a stay. *See id.*

160. *Nken*, 129 S. Ct. at 1757. Even if irreparable damage results in the absence of a stay, a stay "is not a matter of right." *Id.* (citing *Virginian R. Co. v. United States*, 272 U.S. 658 (1926)).

161. *Nken*, 129 S. Ct. at 1757.

162. *Id.* at 1757-60. The majority explains that because subsection (f)(2) does not use the word "stay," the parties disagree about whether a stay is a type of

have typically been understood to serve different purposes.”¹⁶⁵ The majority admits to some “overlap” existing between a stay and an injunction,¹⁶⁶ mainly because both stop a specific action from occurring before “that action has been conclusively determined.”¹⁶⁷ Nevertheless, the Court points out that the key difference between a stay and an injunction is that an “alien seeking a stay of removal pending adjudication of a petition for review does not ask for a coercive order against the Government, but rather for the temporary setting aside of the source of the Government’s authority to remove.”¹⁶⁸ Explaining that the stay sought by an alien is not

injunction and therefore included within the scope of IIRIRA, or whether a stay serves a distinct purpose from an injunction. *Id.* at 1757.

163. *Id.* The Court explains that an injunction is a court order that forbids someone from engaging in a specific act, or a way a court can tell someone to stop or do something specific. *Id.* (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (holding that an injunction “directs the conduct of a party, and does so with the backing of its full coercive powers”); *BLACK’S LAW DICTIONARY* 784 (6th ed. 1990)). Moreover, an injunction is as “every order of the court which commands or forbids,” but also as “a judicial process or mandate operating *in personam*.” *Nken*, 129 S. Ct. at 1757 (citing *BLACK’S LAW DICTIONARY* 800 (8th ed. 2004)). Therefore, the Court concludes that an injunction is directed towards a party and applies to the party’s conduct, whether it is a preliminary or final injunction. *Nken*, 129 S. Ct. at 1757.

164. The majority states that a stay controls a judicial proceeding, rather than a specific party’s action. *Nken*, 129 S. Ct. at 1758. Consequently, a stay halts or postpones a proceeding, or temporarily divests the enforceability of an order. *Id.* (citing *BLACK’S LAW DICTIONARY* 1413 (6th ed. 1990) (defining a stay as “a suspension of the case or some designated proceedings within it.”)).

165. *Nken*, 129 S. Ct. at 1757. Moreover, a key distinction is that a stay “simply suspend[s] judicial alteration of the status quo,” but an injunction “grants judicial intervention that has been withheld by lower courts.” *Id.* at 1758 (citing *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). The Court cites other instances where a stay was differentiated from an injunction: “applicants are seeking not merely a stay of a lower court judgment, but an injunction against the enforcement of a presumptively valid state statute.” *Nken*, 129 S. Ct. at 1758 (citing *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Renquist, C.J., in chambers)).

166. The Court adds that overlap exists particularly between a preliminary injunction and a stay. *Nken*, 129 S. Ct. at 1758.

167. *Id.*

168. *Id.*

generally known as an injunction,¹⁶⁹ Justice Roberts adds some poetic rhetoric to illustrate his point: “[t]he sun may be a star, but ‘starry sky’ does not refer to a bright summer day. The terminology of subsection (f)(2) does not comfortably cover stays.”¹⁷⁰

Next, the Court turns to “Congress’s structural choices” in discussing stays separately from injunctions.¹⁷¹ Justice Roberts makes the case that when Congress wished to discuss stays in IIRIRA, it specified its intent by using the term stay rather than discussing injunctions and enjoining removal.¹⁷² He points to the Court’s former decision in *INS v. Cardoza-Fonseca*,¹⁷³ which held that the Court typically presumes that Congress intentionally includes or excludes certain language or terms.¹⁷⁴ Moreover, the Court challenges the Government’s argument that the majority’s position fails to account for a practical effect of subsection (f)(2)¹⁷⁵ by

169. A stay that relates to the progress of litigation is typically not deemed an injunction. *Id.* (citing *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988); FED. RULE APP. PROC. 8(a)(1)(A) (noting that temporary relief from a lower court’s judgment while awaiting appeal is considered a stay)).

170. *Nken*, 129 S. Ct. at 1759.

171. *Id.*

172. *Id.* The Court uses subsection (b)(3)(B) of IIRIRA to illustrate this point, pointing to the specific use of the term “stay:” “service of a petition for review ‘does not stay the removal of an alien pending the court’s decision on the petition, unless the court orders otherwise.’” *Id.* (citing 8 U.S.C. § 1252(b)(3)(B)). Correspondingly, the heading of subsection (b)(3)(B) is “Stay of order.” *Nken*, 129 S. Ct. at 1759 (citing 8 U.S.C. § 1252(b)(3)(B)). The majority contrasts this subsection, with subsection (f)(2) at issue in this case, which omitted the word “stay,” and used the heading “Limit on injunctive relief” instead. *Nken*, 129 S. Ct. at 1759 (citing 8 U.S.C. § 1252(f)(2) (2005)). The section uses the words “enjoin the removal of any alien.” *Nken*, 129 S. Ct. at 1759.

173. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

174. *Nken*, 129 S. Ct. at 1759 (citing *INS*, 480 U.S. at 423 (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”)). Justice Roberts explains that this applies more than ever to the interpretation of the statute at hand because subsections (b)(3)(B) and (f)(2) were enacted “as part of a unified overhaul of judicial review procedures.” *Nken*, 129 S. Ct. at 1759. The majority justifies this by explaining that subsection (b)(3)(B) would have been the logical place to include an amendment regarding the traditional standard of granting stays. *Id.*

175. *Id.* The majority adds that it is “one thing to propose that ‘enjoin’ in subsection (f)(2) covers a broad spectrum of court orders . . . [but] another to

deducing that Congress either included subsection (f)(2) because of its concern about injunctions of the INA provisions by courts, or that the subsection was included as a catchall to exclude injunctions.¹⁷⁶ The Court ends this discussion by noting that the Government's point is not sufficiently strong to outweigh the Court's reasoning that subsection (f)(2) does not apply to stays.¹⁷⁷

In Subpart C of Part Three, the majority discusses the historical and practical incorrectness of applying the subsection (f)(2) standard to stays.¹⁷⁸ Historically, Justice Roberts explains, allowing courts to grant stays has been justified by a "need 'to prevent irreparable injury to the parties or to the public' pending review."¹⁷⁹ However, the Court maintains that the higher standard of subsection (f)(2), which requires a decision on the merits, does not permit the Court to consider irreparable harm, potentially caused by time limitations or delays.¹⁸⁰ In the majority's view, using the subsection (f)(2) standard to decide whether a stay may be granted "results in something that does not remotely look like a stay."¹⁸¹ The Court concludes Part Three by reiterating that Congress would not "without clearly expressing such a purpose, deprive the Court of Appeals of its

suggest that Congress used 'enjoin' to refer *exclusively* to stays, so that a failure to include stays in subsection (f)(2) would render the provision superfluous" because the terms are not synonymous. *Id.*

176. *Id.* at 1759-60 (citing *Weinberger*, 456 U.S. at 312).

177. *Id.* at 1760.

178. *Nken*, 129 S. Ct. at 1760. First, the Court notes that the reason behind a stay pending appeal is to suspend the matter temporarily to give the court sufficient time to decide on the merits. *Id.* However, under subsection (f)(2), for a stay to be granted, an appellate court must first decide on the merits under the "clear and convincing evidence" standard. *Id.* The Court reasons that if this were the correct purpose of subsection (f)(2), it would invert the traditional function of a stay because it would "requir[e] a definitive merits decision earlier rather than later." *Id.*

179. *Id.* (citing *Scripps-Howard*, 316 U.S. at 9).

180. *Nken*, 129 S. Ct. at 1760. The Court adds that, "[s]ubsection (f)(2) does not resolve the dilemma stays historically addressed: what to do when there is insufficient time to resolve the merits and irreparable harm may result from delay." *Id.*

181. *Id.*

customary power to stay orders under review.”¹⁸² Therefore, Justice Roberts agrees with *Nken* that the subsection (f)(2) standard does not apply when an alien asks an appellate court to “stay removal pending judicial review.”¹⁸³

Part Four of the majority’s opinion asks which standard does apply, if it is not that of subsection (f)(2).¹⁸⁴ The Court begins its query by explaining that, “[a] stay is not a matter of right, even if irreparable injury might otherwise result.”¹⁸⁵ Rather, it depends on the circumstances and is monitored by judicial discretion.¹⁸⁶ The standard governing the Court’s exercise of discretion is reflected in the traditional four factors seen in *Hilton* test.¹⁸⁷ Yet, Justice Roberts admits that there is “substantial overlap between these and the factors governing preliminary injunctions.”¹⁸⁸ Justice Roberts gives the first two factors¹⁸⁹ the most weight, noting that “[m]ore than a mere ‘possibility’ of relief is required” for the first factor,¹⁹⁰ and that removal for aliens is not “categorically irreparable,” and therefore

182. *Id.* (citing *Scripps-Howard*, 316 U.S. at 11). Justice Roberts further repeats that subsection (f)(2) would strip courts of their “customary” authority to grant stays. *Nken*, 129 S. Ct. at 1760.

183. *Id.*

184. *Id.* The Court explains that the parties disagree about whether the “traditional” standard governing stays applies, or whether the stay test must be reformulated, as the Government argues.

185. *Id.* (citing *Virginian Ry. Co.*, 272 U.S. at 672).

186. *Nken*, 129 S. Ct. at 1760-61; see also *Hilton*, 481 U.S. at 777. Furthermore, the burden is on the party calling for the stay to prove that an exercise of judicial discretion is validated by the circumstances. *Nken*, 129 S. Ct. at 1761; see also *Clinton v. Jones*, 520 U.S. 681, 708 (1997); *Landis v. North American Co.*, 299 U.S. 248, 255 (1936).

187. *Nken*, 129 S. Ct. at 1761 (citing *Hilton*, 481 U.S. at 776).

188. *Nken*, 129 S. Ct. at 1761 (citing *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 376-77 (2008)). The Court adds that these factors are not the same, but the majority touch on related concerns when dealing with courts preventing actions before a final decision has been reached. *Nken*, 129 S. Ct. at 1761.

189. These first two factors are: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay.” *Hilton*, 481 U.S. at 776.

190. *Nken*, 129 S. Ct. at 1761.

more is required to prove the second factor.¹⁹¹ Upon satisfying these two factors under the traditional stay test, the court must weigh the harm to the opposing party and the public interest, factors that merge when the opposing side is the Government.¹⁹² Ultimately, the majority holds that appellate courts must not presume that these interests weigh in the appellant's favor, and must analyze these factors individually to reach its conclusion.¹⁹³

The Court asserts that the Court of Appeals did not specify which standard was used when denying *Nken*'s stay of removal, although use of the subsection (f)(2) standard was the precedent.¹⁹⁴ Because this Court decided that the subsection (f)(2) standard does not apply to stays, the majority vacated and remanded the lower court's decision under the traditional stay standard in this opinion.¹⁹⁵

191. *Id.* The Court holds that some courts erred in its analysis regarding removal, because it is not per se irreparable. *Id.*; see e.g., *Ofosu v. McElroy*, 98 F.3d 694, 699 (2d Cir. 1996). Although the automatic stay that existed before the enactment of IIRIRA acknowledged that removal before an appellate court decision was irreparable, with the enactment of IIRIRA, automatic stays were abolished. *Nken*, 129 S. Ct. at 1761. Therefore, subsection (b)(3)(B) got rid of the reason for categorical stays because it permits "prosecution of a petition after removal." *Id.* The Court notes that this confirms the notion that removal does not in and of itself constitute irreparable injury because aliens can still pursue their petitions despite being successfully removed. *Id.* Furthermore, the majority adds that effective relief can be provided to those who prevail on their petitions for review. *Id.*

192. *Nken*, 129 S. Ct. at 1762. The Court admits that the public interest is not entirely that of the Government, acknowledging that additional public interests exist. *Id.* First, there is the interest of "preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm," which, however, is not a reason to instantly grant a stay. *Id.* Secondly, there is a public interest in carrying out removal orders promptly, because when an alien is deemed lawfully removable, the alien's presence in this country violates United States law. *Id.* (citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999)). Finally, the Court adds that there may be a public interest in removing an alien whose presence is dangerous for the United States or who has abused of the legal system. *Nken*, 129 S. Ct. at 1762.

193. *Id.*

194. *Id.*

195. *Id.*

Therefore, *Nken's* stay of removal motion will be considered under the traditional standard, rather than the subsection (f)(2) standard.¹⁹⁶

*B. Justice Kennedy's Concurring Opinion*¹⁹⁷

Justice Kennedy begins his concurrence by reiterating the majority's assertion that "[a] stay of removal is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as of right."¹⁹⁸ However, the concurring opinion differs from the majority most significantly in its interest in more "empirical data on the number of stays granted, the correlation between stays granted and ultimate success on the merits, or similar matters."¹⁹⁹ Justice Kennedy's reasoning in aspiring to less stays of removal being granted hinges on the sheer numbers of immigration petitions filed in the United States.²⁰⁰ In order to decrease the number of immigrants' petitions, Justice Kennedy wants the granting of stays to be made more difficult, he notes that four-factor inquiry under the traditional standard must be "particularized," and there must be more than "mere removal" in order for a stay to be warranted.²⁰¹ The concurring opinion concludes on the note that the stay applicant bears a heavy burden of proving that error on the merits occurred in the

196. *Id.* As a result of the Supreme Court ruling, the present case was remanded, and the Fourth Circuit then vacated and remanded the case in *Nken v. Holder*, 585 F.3d 818, 823 (4th Cir. 2009).

197. Justice Kennedy's concurring opinion is joined by Justice Scalia. *Nken*, 129 S. Ct. at 1762-64.

198. Justice Kennedy even uses the same case as used by the majority to support its contention. *Id.* at 1762 (citing *Virginian Ry. Co.*, 272 U.S. at 672-73).

199. *Id.* Justice Kennedy explains that obtaining such statistics would be beneficial in determining whether the decision in the present case produces a "fair and effective result" and so that Congress can ascertain that the purposes of its statute are being achieved. *Nken*, 129 S. Ct. at 1762-63 (Kennedy, J., concurring).

200. *Id.* at 1763. For instance, Justice Kennedy shows concern that over half of all American immigration petitions are considered by the Ninth Circuit Court of Appeals. *Id.* He adds that "courts should not grant stays of removal on a routine basis." *Id.* He explains that the danger of irreparable harm resulting from removal is reduced by IIRIRA, which now permits aliens who leave the country to seek review, something that aliens did not have the ability to do previously. *Id.* (citing 8 U.S.C. § 1105a(c) (1994)).

201. *Nken*, 129 S. Ct. at 1763 (Kennedy, J., concurring).

district court's judgment as well as irreparable injury inevitably suffered by the applicant in the absence of a stay.²⁰²

*C. Justice Alito's Dissenting Opinion*²⁰³

Justice Alito begins his dissent with strong sentiment: "The Court's decision nullifies an important statutory provision that Congress enacted when it reformed the immigration laws in 1996. I would give effect to that provision . . ."²⁰⁴ In Part One of his dissent, Justice Alito describes the process for an alien when first charged with being "removable" from the United States, and explains that removal orders are not governed by "judicial enforcement."²⁰⁵ The dissent's analysis differs from that of the majority because Justice Alito states that the alien may request a stay from the Executive Branch.²⁰⁶ Therefore, he notes that an alien "wants *a court* to restrain

202. *Id.* (citing *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979)).

203. The dissent is presented by Justice Alito, and is joined by Justice Thomas. *Nken*, 129 S. Ct. at 1764-69.

204. *Id.* at 1764.

205. *Id.* The dissent explains that, first, an immigration judge decides whether the alien must be removed, and then the alien may appeal that order before the Board of Immigration Appeals. *Id.* (citing 8 U.S.C. §§ 1101(47)(B) (2009), 1229a(a) (2006); 8 C.F.R. §§ 1240.1(a)(1)(i), (c), 1241.1, 1241.31 (2008)). He declares that an order is final when the appeal is unsuccessful and therefore it may be executed at any time. *Nken*, 129 S. Ct. at 1764-69 (Alito, J., dissenting) (citing 8 U.S.C. §§ 1231(a)(1)(B)(i)(2006), 1252(b)(8)(C) (2005); 8 C.F.R. § 1241.33 (2005)). Therefore, he states that orders for removal "are self-executing orders, not dependent upon judicial enforcement." *Nken*, 129 S. Ct. at 1764 (Alito, J., dissenting) (citing *Stone v. INS*, 514 U.S. 386, 398 (1995)).

206. *Nken*, 129 S. Ct. at 1764 (Alito, J., dissenting) (citing 8 C.F.R. §§ 241.6(a)-(b), 1241(a)-(b)(2005). The Code of Federal Regulations (C.F.R.) provides:

Any request of an alien under a final order of deportation or removal for a stay of deportation or removal shall be filed on Form I-246, Stay of Removal, with the district director having jurisdiction over the place where the alien is at the time of filing. The Commissioner, Deputy Commissioner, Executive Associate Commissioner for Field Operations, Deputy Executive Associate Commissioner for Detention and Removal, the Director of the Office of Juvenile Affairs, regional directors, or district director, in his or her discretion and in consideration of factors listed in 8

the Executive from executing a final and enforceable removal order[;] the alien must seek an injunction to do so.”²⁰⁷ Hence, the dissent reasons that the “plain text” of IIRIRA applies to this injunction.²⁰⁸

CFR 212.5 and section 241(c) of the Act, may grant a stay of removal or deportation for such time and under such conditions as he or she may deem appropriate. Neither the request nor failure to receive notice of disposition of the request shall delay removal or relieve the alien from strict compliance with any outstanding notice to surrender for deportation or removal.

8 C.F.R. § 241.6(a) (2005). Therefore, when an alien seeks to stay an order of removal, the parties listed above, and not the court of appeals decide whether to grant a stay. *See generally id.*

However, subsection (b) also provides that:

Denial by the Commissioner, Deputy Commissioner, Executive Associate Commissioner for Field Operations, Deputy Executive Associate Commissioner for Detention and Removal, Director of the Office of Juvenile Affairs, regional director, or district director of a request for a stay is not appealable, but such denial shall not preclude an immigration judge or the Board from granting a stay in connection with a previously filed motion to reopen or a motion to reconsider as provided in 8 CFR part 3.

8 C.F.R. § 241.6(b) (2005). Although the Commissioner’s denial of a stay is not appealable, an immigration judge or the Board of Immigration Appeals may grant a stay for a previous motion to reopen or reconsider. *See generally id.* Therefore, the court system has a separate power to grant a stay.

Finally, section 241.6(c) provides that:

The Service shall take all reasonable steps to comply with a stay granted by an immigration judge or the Board. However, such a stay shall cease to have effect if granted (or communicated) after the alien has been placed aboard an aircraft or other conveyance for removal and the normal boarding has been completed.

8 C.F.R. § 241.6(c). Therefore, the fact that the “Executive Branch” described by Justice Alito may grant a stay of removal does not exclude the courts from having discretion in granting stays.

207. *Nken*, 129 S. Ct. at 1764 (Alito, J., dissenting) (“making a final order of removal subject to 28 U.S.C. §2349(b), which provides that an ‘interlocutory injunction’ can ‘restrain’ the ‘execution of’ a final order”) (citing 8 U.S.C. § 1252(a) (2005)).

208. *Nken*, 129 S. Ct. at 1764 (Alito, J., dissenting).

Part Two of the dissent is broken into three subparts. Justice Alito notes in Subpart A that it is undisputed that Nken is “remova[ble] ... pursuant to a final order.”²⁰⁹ In Subpart B, Justice Alito opens with the focal question of whether relief sought by Nken was an “order enjoin[ing] his removal.”²¹⁰ The dissent discusses the ordinary use of the word “enjoin” and applies the definition to the order sought by Nken in this case.²¹¹ Upon this application, Justice Alito finds the majority’s conclusion, that the present case involves a stay rather than an injunction, to be erroneous for three reasons.²¹² The first reason given by Justice Alito is that a stay is merely a type of injunction.²¹³ Moreover, the dissent demonstrates examples of statutes and judicial decisions where the word “injunction” was used

209. *Id.* at 1764-65.

210. *Id.* at 1765.

211. *Id.* Justice Alito defines the term “enjoin” as “to ‘require,’ ‘command,’ or ‘direct’ an action, or to ‘require a person . . . to perform, or to abstain or desist from, some act.’” *Id.* (citing BLACK’S LAW DICTIONARY 529 (6th ed. 1990)). Moreover, the majority explains that the term is also defined as “to prohibit or restrain by a judicial order or decree.” *Nken*, 129 S. Ct. at 1765 (Alito, J., dissenting) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 754 (1993)). The dissent therefore states that:

When an alien subject to a final order of removal seeks to bar executive officials from acting upon that order pending judicial consideration of a petition for review, the alien is seeking to “enjoin” his or her removal. The alien is seeking an order “restrain[ing]” those officials and “requir[ing]” them to “abstain” from executing the order of removal.

Nken, 129 S. Ct. at 1765 (Alito, J., dissenting).

212. *Id.*

213. *Id.* (citing BLACK’S LAW DICTIONARY 1413 (6th ed. 1990)). Moreover, Justice Alito cites various court of appeals cases repeating the sentiment: “the term ‘stay’ is a subset of the broader term ‘enjoin’” and “a stay is a form of injunction.” *Nken*, 129 S. Ct. at 1765 (Alito, J., dissenting) (citing *Teshome-Gebreegziabher v. Mukasey*, 528 F.3d 330, 333 (4th Cir. 2008)); *Kijowska v. Haines*, 463 F.3d 583, 589 (7th Cir. 2006)). However, he does not discuss the Supreme Court’s use of the term “stay.” The dissent concludes that “it is unremarkable that we have used the word ‘stay’ to describe an injunction blocking an administrative order pending judicial review.” *Nken*, 129 S. Ct. at 1765 n.1 (Alito, J., dissenting). However, the dissent does not address why the separate sections exist in IIRIRA, one discussing injunctions and the other discussing stays.

to discuss a “stay” of judicial proceedings.²¹⁴ Giving his second reason for disagreeing with the majority, Justice Alito suggests that the majority treats subsection (f)(2) of IIRIRA as an unimportant provision.²¹⁵ Justice Alito states that the purpose of IIRIRA was to “expedite removal and restrict the ability of aliens to remain in this country pending judicial review,”²¹⁶ and therefore subsection (f)(2) “fits perfectly within this scheme” because the subsection “provides that a court may not block removal during the judicial review process.”²¹⁷ Next, the dissent notes that the majority erred in its results, noting that it is unlikely that Congress would not have provided a standard for courts to decide whether to permit removal while the alien awaits judicial review.²¹⁸ Justice Alito’s last point in supporting this disagreement is that the majority did not provide an adequate purpose for the existence of subsection (f)(2) if it is not to regulate both stays and injunctions.²¹⁹ The third reason behind the

214. *Id.* at 1766. Justice Alito’s first example is the Anti-Injunction Act, which instructs that a “court of the United States may not grant an injunction to stay proceedings in a State court.” *Id.* (citing 28 U.S.C. § 2283 (2003)). However, most of the examples pair the term “injunction” with the term “stay” in order to specify the meaning of “injunction.” *Nken*, 129 S. Ct. at 1766 (Alito, J., dissenting) (habeas petitioner sought injunction to stay his execution) (citing *Hill v. McDonough*, 547 U.S. 573, 578-580 (2006)). However, the dissent provides no examples where the terms “enjoin” or “injunction” are used alone to discuss a stay, without including the term “stay” to clarify the meaning. *See generally Nken*, 129 S. Ct. at 1766.

215. *Id.*

216. *Id.*

217. *Id.* However, Justice Alito omits the pertinent term “enjoin” from his analysis, because subsection (f)(2) is limited to injunctions, rather than all court actions blocking regarding removal. *See generally id.*; *see also* 8 U.S.C. § 1252(f)(2) (2004) (“no court shall enjoin the removal of any alien . . .”). He fails to explain the connection between his reasoning that courts cannot “block” removal, which seems to lump “stay” and “enjoin” together, and the statute’s language, which specifies the term “enjoin.” *See generally Nken*, 129 S. Ct. at 1766 (Alito, J., dissenting).

218. *Id.* Yet, the dissent once again generalizes the subsection (f)(2) standard to control all court decisions regarding removals, rather than injunctions that this subsection controls, as indicated by the express language of (f)(2). *See generally Nken*, 129 S. Ct. at 1766 (Alito, J., dissenting).

219. *Nken*, 129 S. Ct. at 1766-67. Justice Alito suggests that the Court’s “hyper-technical distinction between an injunction and a stay” provides no purpose for the existence of subsection (f)(2) if it applies only to injunctions. *Id.* He adds

dissent's analysis is that the order at issue in this case is "best viewed as an injunction" rather than a stay.²²⁰ Justice Alito adds that even if Nken sought to "block his removal" while awaiting judicial review, "any interim order blocking his removal would best be termed an injunction."²²¹ Moreover, Justice Alito notes that IIRIRA is governed by the Hobbs Act, 28 U.S.C. § 2349 (2003).²²²

that the majority's reasoning is flawed because subsection (f)(2) operates "[n]otwithstanding any other provision of law." *Id.* However, the interpretation of the term "enjoin" is not a provision of law but an aid to understand Congress's meaning.

220. *Id.* at 1767. The dissent asserts that in the present case Nken seeks "an order barring Executive branch officials from removing him from the country" rather than an order that would "simply suspend judicial alteration of the status quo." *Id.* Justice Alito cites a Supreme Court case where "although applicants claimed to seek a 'stay,' the court granted an 'injunction' because 'the applicants actually [sought] affirmative relief' against executive officials." *Id.* (citing *McCarthy v. Briscoe*, 429 U.S. 1317 at 1317, n.1 (1976)). However, in the present case, Nken's motion to stay removal was to a judge, rather than the Executive Branch. *See* Nken, 129 S.Ct. at 1762 ("A court asked to stay removal cannot simply assume that '[o]rdinarily, the balance of hardships will weigh heavily in the applicant's favor.'") (citing *Andreiu*, 253 F.3d at 484).

221. *Nken*, 129 S. Ct. at 1767 (Alito, J., dissenting). Justice Alito reasons that when the BIA affirmed Nken's "final removal order," all legal authority was vested in the Executive Branch so that Nken could effectively be removed from the United States. *Id.*

222. *Id.* (citing 8 U.S.C. § 1252(a)(1) (2004)). The dissent observes that the Hobbs Act refers to an "application for an *interlocutory injunction* restraining or suspending the enforcement, operation, or execution of, or setting aside" a final order. *Nken*, 129 S. Ct. at 1767 (citing 28 U.S.C. § 2349(b) (2003)). However, the dissent omits subsection (a) of the Hobbs Act in its analysis, which states:

The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

28 U.S.C. § 2349(a) (2003). Under this subsection, the Hobbs Act permits the court of appeals to vacate both stays and interlocutory injunctions, but not

Consequently, Justice Alito states that Nken sought an order that would bar his removal from the United States by the Executive Branch, adding that Nken is not “contest[ing] the correctness of the removal order,” but wants it set aside because of social and political changes in Cameroon.²²³ Therefore, the dissent concludes that an injunction is the most accurate type of relief for Nken’s motion.²²⁴

injunctions exclusively as suggested by the dissent. *See generally* 28 U.S.C. § 2349(a) (2003). Moreover, subsection (b) of the Hobbs Act provides:

The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the *court of appeals* in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition.

28 U.S.C. § 2349(b) (1984) (emphasis added). Therefore, the court of appeals has the authority to restrain or suspend a final order, not the Executive Branch as suggested by the dissent. Furthermore, under the same subsection of the Hobbs Act,

In a case in which *irreparable damage* would otherwise result to the petitioner, the court of appeals *may*, on hearing, after reasonable notice to the agency and to the Attorney General, *order a temporary stay* or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application.

See generally id. (emphasis added). Therefore, the fact that the IIRIRA is governed by the Hobbs Act does not establish that subsection (f)(2) of IIRIRA must refer only to a stay. Similarly, the Hobbs Act clearly provides the court of appeals, not the Executive Branch, with the power to stay, unlike Justice Alito’s argument that the Executive Branch has the power to grant a stay. *See generally* 28 U.S.C. § 2349(b) (1984).

223. *Nken*, 129 S. Ct. at 1767 (Alito, J., dissenting). Justice Alito observes that, “[a] motion to reopen an administrative proceeding that is no longer subject to direct judicial review surely seeks ‘an order altering the status quo.’” *Nken*, 129 S.

Finally, in Part Three, Justice Alito challenges the majority's reasoning in three ways.²²⁵ First, Justice Alito contests the majority's view that "applying 8 U.S.C. § 1252(f)(2) would "deprive" us of our 'customary' stay power."²²⁶ The dissent justifies the use of the subsection (f)(2) standard in the case at hand by noting that IIRIRA's "theme" was to restrict judicial review.²²⁷ Next, the dissent seeks to undermine the majority's statement that the logical location of stays in IIRIRA is subsection (b)(3)(B) rather than (f)(2).²²⁸ On this point, Justice Alito comments that he would "not read too much into Congress' decision to locate such a provision in one subsection rather than . . . another."²²⁹ Third, in terms of the majority's argument that

Ct. at 1767 (citing *Nken*, 129 S. Ct. at 1758; see *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301 (1993)).

224. *Nken*, 129 S. Ct. at 1767.

225. *Id.* at 1767-68.

226. *Id.* at 1768 (citing *Nken*, 129 S. Ct. at 1760).

227. *Nken*, 129 S. Ct. at 1768 (Alito, J., dissenting) (citing American-Arab Anti-Discrimination Comm., 525 U.S. at 486). Moreover, Justice Alito explains that it is within Congress's authority to regulate federal courts. *Nken*, 129 S. Ct. at 1767 (Alito, J., dissenting) (citing *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001)).

228. *Nken*, 129 S. Ct. at 1768 (Alito, J., dissenting) (citing *Nken*, 129 S. Ct. at 1759).

229. *Nken*, 129 S. Ct. at 1768. The dissent reasons that there is nothing "unnatural" about Congress discussing a "common subject" in different subsections. *Id.* Justice Alito points to other subsections discussing this review by courts. *Id.* (citing 8 U.S.C. §§ 1252 (a)(2)(A), (g)). While subsection (a)(2)(A) broaches the subject of jurisdiction to review, subsection (g) discusses courts' jurisdiction to hear claims. *Nken*, 129 S. Ct. at 1768 (Alito, J., dissenting) (citing 8 U.S.C. § 1252 §§ (a)(2)(A), (g) (2005)). However, the sections cited by the dissent do not discuss stays specifically. See generally *Nken*, 129 S. Ct. at 1768 (Alito, J., dissenting) (citing 8 U.S.C. § 1252 §§ (a)(2)(A), (g)).

Justice Alito accounts for the use of the term "stay" in subsection (b)(3)(B) because INA, the controlling statute regarding stays before IIRIRA, permitted automatic stays, and thus subsection (b)(3)(B) was enacted to repeal INA's automatic stay. *Nken*, 129 S. Ct. at 1768 (Alito, J., dissenting) (citing Immigration and Nationality Act, 8 U.S.C. § 1105a(a)(3) (1994 ed. (repealed 1996)). Therefore, the dissent explains that subsection (b)(3)(B) employs the word "stay" "because that is the term that was used in the provision that it replaced." *Nken*, 129 S. Ct. at 1768 (Alito, J., dissenting). However, if the term "enjoin" in subsection (f)(2) was used to replace the term "restrain and enjoin" in subsection 242(f)(1) of the INA, then it would seem that Congress did not intend the term "enjoin" to have a broad meaning, but rather to include injunctions alone. See generally *supra* note 112 and accompanying text.

the higher standard of subsection (f)(2) would be “inequitable” in removing aliens from the United States, the dissent argues that it is IIRIRA’s standard that applies where an alien desires to remain in the United States while judicial review is pending.²³⁰ The dissent ends by repeating that the correct standard in this case is the (f)(2) standard and that Justice Alito would affirm the Court of Appeals’ decision.²³¹

V. IMPACT OF THE COURT’S DECISION

A. Broad Impact

1. Increase in Immigration Appeals in the early 2000s

The primary legal impact of *Nken v. Holder* is that it opens up the door for additional aliens’ appeals, permissible under the law. This trend is hardly new, however, as scholars over the past five years have noted a dramatic increase in immigration appeals reaching the U.S. courts of appeals.²³² Beginning in the early 2000s, it seems that a remarkable number of immigrants petitioned courts to review BIA decisions, a number so remarkable in fact that this period has been christened the “immigration surge.”²³³ The effect this surge had on the legal system at that time was that it “placed a significant strain on judicial resources, requiring courts to hire additional staff, recruit visiting judges, and schedule extra sessions for hearing cases.”²³⁴

230. *Nken*, 129 S. Ct. at 1768 (Alito, J., dissenting). However, the dissent seems to be using circular reasoning in its third argument. See generally *id.* at 1768-69. The dissent merely states that pending judicial review the appropriate standard is that provided in subsection (f)(2), but does not explain why “this scheme is [not] inequitable,” or why (f)(2) was intended to control the action sought by *Nken*. *Id.*

231. *Id.* at 1769.

232. John R.B. Palmer, Steven W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions In Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3 (2005).

233. *Id.*

234. *Id.* Moreover, the period impacted the caseload for the Department of Justice and immigration lawyers alike, posing a greater challenge in terms of “scheduling orders and the mountains of appellate briefs now becoming due.” *Id.*;

Not surprisingly, the two circuits to have been primarily affected by this surge are the Second and Ninth circuits.²³⁵

What was the cause of this initial surge in immigration appeals? Although scholars initially assumed that the surge was merely a result of a “government crackdown on undocumented aliens,” they soon discovered a different explanation.²³⁶ It seems that the actual reason behind the transformation of the immigration system in the 2000s was “a mostly unrelated change in the way the BIA carries out its work.”²³⁷ A tremendous backlog of immigration cases developed; a backlog that was at its worst in the 1990s.²³⁸ In order to adjust to this tremendous caseload, the BIA was forced to rely on single Board members rather than three-member panels for case decisions as it had in the past.²³⁹ However, the “volume of petitions for review reaching the federal courts began to rise almost immediately and continued to rise as the BIA implemented further procedural changes.”²⁴⁰ As a consequence, the volume of petitions for review increased five-

see also *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals*, COMM’N ON THE FEDERAL COURTS, ASS’N OF THE BAR OF THE CITY OF N.Y., Aug. 31, 2004, available at <http://www.abcnyc.org/pdf/report/AppealSurgeReport.pdf> (discussing the impact of the immigration surge on courts of appeals); Marcia Coyle, *A Swamped DOJ Farms Out Immigration Cases*, 27 NAT’L L.J. 4 (2005) (discussing the impact of the immigration surge on the Department of Justice); Dan Eggen, *Immigration Backlog Forces Justice to Shift Staffing*, WASH. POST, Dec. 14, 2004, at A11.

235. Palmer, *supra* note 232, at 3.

236. *Id.*

237. *Id.* at 4.

238. *Id.* In March 2002, the backlog was so bad that 56,000 cases needed to be reviewed by BIA. *Id.* (citing Attorney General John Ashcroft, *News Conference, Administrative Change to Board of Immigration Appeals*, Feb. 6 2002, available at http://www.yale.edu/lawweb/avalan/sept_11/ashcroft_011.htm).

239. Palmer, *supra* note 232, at 3-4. This permitted Board members to “summarily reject appeals through affirmances without opinion (AWOs) and summary dismissals.” *Id.* at 4.

240. *Id.* Even circuit court judges noted the change. *Id.* Judge Jon O. Newman of the Second Circuit was quoted on the topic, saying “It’s as if a dam had built up a massive amount of water over the years, and then suddenly the sluice gates were opened up and the water poured out.” *Id.* (citing *Appeals Courts Flooded With Immigration Cases*, All Things Considered (NPR broadcast Nov. 19, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=4179087>).

fold.²⁴¹ Thus, scholars trace the increase of appeals in part to the rise in BIA output, explaining that when one rises, it is logical for the other to increase.²⁴² Yet what is more important is that the immigration surge (or at least the rate at which BIA decisions are appealed) is “disproportionately large” compared to the initial number of BIA decisions.²⁴³ Therefore, the high number of immigration appeals today may be a result of the backlog created as early as the 1990s.

2. Opening Up the Gate for Further Immigration Appeals

Therefore, in a time where more and more immigration appeals are materializing before the courts of appeals, it may come as a surprise that the Court in *Nken v. Holder* chose a less stringent standard, making it less difficult for immigrants to be successful in their appeals. Although those in support of more open, or lenient, standards of immigration may be very excited about the outcome of *Nken v. Holder*, there are those who view the decision as giving too

241. Palmer, *supra* note 232, at 4. The article notes that the courts of appeals received five times more petitions in 2005 as before 2002. *Id.* (citing DORSEY & WHITNEY LLP, BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT (2003), available at http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf).

242. Palmer, *supra* note 232, at 4.

243. *Id.* at 4-5. Scholars hoped that the BIA backlog would be cleared once the new system of using single BIA members to review petitions would be used. *Id.* at 4-5 n.7. Moreover, some scholars suggest that the increase in appeals from BIA decisions results from a decrease in quality of decisions because the BIA is understaffed, and the BIA's ability to merely summarily affirm Immigration Judge decisions. See generally *id.* at 5, n.8 (citing *Seeking Meaningful Review: Findings and Recommendations in Response to Dorsey & Whitney Study of Board of Immigration Appeals Procedural Reforms*, ABA COMM'N ON IMMIGR. POL'Y, PRAC. & PRO BONO (2003), <http://www.abanet.org/immigration/bia.pdf>). However, the Department of Justice's EOIR responds that the quality of BIA decisions is not the cause of increased appeals. *Id.* at 5 (citing EOIR, FACT SHEET: BIA STREAMLINING 2 (Sept. 15, 2004), available at <http://www.usdoj.gov/eoir/press/04/BIAStreamlining2004.pdf>). Instead, the EOIR reasons that the BIA's current prompt decisions prevent aliens from relying on the BIA's lengthy backlog in order to secure extra time in this nation. Palmer, *supra* note 232, at 5. Therefore, with the faster turnaround rate for BIA decisions, aliens now have to rely on petitions for review and the apparent willingness of courts of appeals to grant stays of removal while aliens await adjudication. *Id.*

much power to the courts of appeals and making it too easy for immigrants to fight deportation or removal orders.²⁴⁴ Critics argue that the decision nullifies IIRIRA, which was enacted to reform immigration law.²⁴⁵ In particular, Lamar Smith, House Judiciary Committee Ranking Member, who co-authored IIRIRA with Senator Alan Simpson, states that a primary goal of IIRIRA was to “prevent federal judges from frivolously interfering in the removal of aliens who immigration judges had ordered removed from the United States.”²⁴⁶ With the Court’s holding in *Nken v. Holder*, courts of appeals have more discretion in weighing certain factors in their decision of whether an appeal of a stay of removal order has merit. Therefore, critics, including Lamar Smith, believe that this Court opinion gives federal courts too much discretion in permitting immigrants to remain in the United States, as opposed to the stringent standard in IIRIRA that gives courts of appeals little power in overturning typical orders forbidding stays of removal.²⁴⁷ Regardless of one’s opinion of the outcome of *Nken v. Holder*, it is clear that courts of appeals today will continue to have increased discretion to stay aliens’ removal orders until their cases have been fully adjudicated. Furthermore, IIRIRA will be read narrowly, as Congress had intended to use the term “enjoin” to include only injunctions, and therefore affect injunctions alone.

244. “House Judiciary Committee Ranking Member Lamar Smith criticized today’s Supreme Court ruling in *Nken v. Holder*, calling it a ‘great disservice to the American people.’” *Scotus Decision Disservice to Americans*, U.S. FED. NEWS, 2009 WLNR 7575491 April 23, 2009.

245. *Id.* This argument is an echo of Justice Alito’s previously stated reasoning. See *supra* note 205 and accompanying text.

246. See *supra* note 244 and accompanying text.

247. *Id.* “The end result will be to allow liberal federal courts free rein to frustrate the prompt removal of criminal and illegal immigrants. The American people deserve better.” *Id.*

B. Legal Impact

1. Immigration Under the Obama Administration

Is immigration reform “deader than a doornail” in the United States ever since President Barack Obama stepped into office?²⁴⁸ Before being elected, President Obama often discussed his plans for immigration reform and the importance of the issue.²⁴⁹ For example, in 2007 President Obama “vowed . . . to crusade for immigration reform if elected president.”²⁵⁰ Obama was elected on November 4, 2008, to become the nation’s forty-fourth president.²⁵¹ However, more recently, in 2010, his critics accuse him of not being able to live up to their expectations.²⁵² Some critics say that, “Obama’s failure to push immigration reform was symbolized by his State of the Union

248. Spencer S. Hsu, *Chances Are Dim, But Advocates Will Still Push for Immigration Reform*, WASH. POST, Feb. 1, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/31/AR2010013102081.html>.

249. Kenneth R. Bazinet, *Straddling Border on Immigration Issue. Do Illegals Help – or Hurt?*, N.Y. DAILY NEWS, July 3, 2007. For instance, President Obama was quoted as saying the following in 2007:

‘The 12 million people living illegally in our country are by and large working people who want nothing more than a better life for themselves and their kids, and are contributing in many ways to our country,’ Obama said, citing a study that shows illegal immigrants contributed \$17.7 billion to the gross state product of Texas in 2005.

‘But even as we’re a nation of immigrants, we’re also a nation of laws,’ Obama said. ‘We can’t tolerate 2,000 people violating our borders every day, which is why we need comprehensive immigration reform that includes additional personnel, infrastructure and technology on the border and at our ports of entry.’

Id.

250. Beth Reinhard, *Clinton, Obama Address La Raza*, MIAMI HERALD, July 23, 2007, available at <http://www.miamiherald.com/2007/07/23/201957/clinton-obama-address-la-raza.html>.

251. Alex Johnson, *Barack Obama Elected 44th President*, MSNBC, Nov. 5, 2008, available at <http://www.msnbc.msn.com/id/27531033>.

252. Hsu, *supra* note 248.

address last Wednesday [January 27, 2010], when he devoted 38 of about 7,300 words to the issue.”²⁵³ Others add that President Obama’s 2010 State of the Union address left Americans “little hope that the Obama administration will try to push a comprehensive immigration reform plan through Congress anytime soon.”²⁵⁴ The apparent reasoning behind setting aside the issue of immigration is that the President has a “full plate” in terms of legislative issues to resolve.²⁵⁵ Ultimately, scholars guess that it may be another year before the President will return to immigration reform.²⁵⁶

Nevertheless, the issue is a pressing one affecting Americans more than some might like to admit. Solving the nation’s immigration problems may directly affect important problems such as America’s economy and unemployment, national security, and

253. Teresa Watanabe, *Latinos Seek More Support for Immigration Reform Illinois Congressman Tells L.A. Protesters That He Needs More Votes For a Reform Bill*, L.A. TIMES, Feb. 2, 2010, available at: <http://articles.latimes.com/2010/feb101/local/la-me-immig-reform2-2010feb02>; see also Hsu, *supra* note 248.

With time running out before lawmakers want to start focusing on the November elections, ‘immigration is deadlier than a doornail,’ one veteran Senate lobbyist put it. Advocates’ frustration peaked last week when Obama devoted a single sentence in his 71-minute State of the Union address to a topic he ranked as a top legislative priority last summer, after health care and an energy bill.”). The thirty-eight words devoted to immigration reform in President Obama’s speech were: “And we should continue the work of fixing our broken immigration system, to secure our borders, and enforce our laws, and ensure that everyone who plays by the rules can contribute to our economy and enrich our nation.

Dan Moffett, *The Wrong Issue to Delay: Immigration Deserves More Than 40 Words*, PALM BEACH POST, Feb. 2, 2010, available at: <http://www.palmbeachpost.com/opinion/columnists/the-wrong-issue-to-delay-immigration-deserves-more-206793.html>.

254. Moffett, *supra* note 253. Critics note that it would be difficult to disagree with the President’s thirty-eight word statement merely because of its “perfunctory” nature. *Id.* (“Now, Mr. Obama may move immigration from the back burner to the pantry for another year, if it stays in the kitchen at all.”).

255. *Id.*

256. *Id.*

perhaps even health care dilemmas.²⁵⁷ Immigration shapes the United States in a significant way, with a recent study showing that twelve million illegal immigrants reside in the United States.²⁵⁸ In terms of fixing the American economy, the UCLA study suggests that \$1.5 trillion is perhaps at stake, depending on the type of reform measures taken to enhance the gross domestic product of the nation.²⁵⁹ Moreover, in view of “[s]everal proposals in Congress call[ing] for allowing illegal immigrants a path toward permanent residency and citizenship if they pass background checks, learn English, and pay fees,” there may be more than just economic benefits resulting from some type of immigration reform.²⁶⁰ The study discusses occurrences from the mid-1980s that allow researchers to find that “immigrant workers who gain legal status go on to function at higher levels in the economy and in American society. They move on to better-paying jobs, and pay more taxes. They become more educated, and pay more taxes. They consume more, so they spend more, and pay more taxes.”²⁶¹

President Obama and his critics alike do not discuss immigration in the context of illegal immigrants exclusively.²⁶² In his State of the Union address, President Obama connected the topic of illegal immigration to the reasoning behind permitting asylees and refugees to remain in the United States.²⁶³ The President added in his speech that, “[i]n the end, it’s our ideals, our values that built America, values that allowed us to forge a nation made up of immigrants from every corner of the globe, values that drive our citizens still.”²⁶⁴

257. *Id.*

258. Moffett, *supra* note 253.

259. *Id.* The Immigration Policy Center and the Center for American Progress, which is said to support immigration reform, sponsored the study in question. *Id.*

260. *Id.*

261. *Id.* Hence, it seems that the study endorses “trickle-up economics,” a model where American workers fare better when foreign workers’ conditions are more stable. *Id.* Moreover, the study contemplates a hypothetical scenario where all illegal immigrants are deported, finding that the GDP of the United States would lose \$2.6 trillion dollars over ten years because there are insufficient American workers to fill in jobs done by illegal immigrants. *Id.*

262. *See generally id.*

263. Moffett, *supra* note 253.

264. *Id.*

Commentators state that the UCLA study regarding immigrants suggests similar reasoning: that the United States does not function when so many of its residents, albeit unofficial ones, are prevented from partaking in the nation's affairs.²⁶⁵ The study therefore merges the issue of immigration with economics, which may suggest the social and economic impact that may result from permitting more aliens to remain in the country by granting them asylee or refugee status.

2. Immigration and the United States Supreme Court

Although, for the most part, immigration reform is discussed in terms of illegal aliens by the President and critics of his actions, other immigration issues, such as the status of asylees and refugees, remain in the hands of the judicial system. The magnitude of the immigration issue is perhaps best represented by the judicial branch's recent interest in the topic.²⁶⁶ This past term, the Supreme Court took on four cases relating to immigration law.²⁶⁷ Because the Court does not often take on this many immigration cases at a time, this development intimates the significance of immigration to the Court, as much as its significance to the general public.²⁶⁸

265. *Id.* ("For America to work at its best and to endure, all of its people have to share the same values and ideals. That can't happen when millions of residents are excluded from participating in all the country has to offer."). Although the study discusses economic incentives for legalizing some of the unofficial and illegal immigrants in the country, it is silent on the effect on the immigrants themselves. Interestingly enough, it is this reasoning discussing justice for the immigrants, rather than economic or judicial benefits, that the majority references in its opinion.

266. See generally Kevin Johnson, *The Supreme Court's Immigration Cases From Last Term*, NEWSTEX WEB BLOGS, July 6, 2009, <http://www.concurringopinions.com/archives/2009/07/the-supreme-courts-immigration-cases-from-last-term.html>.

267. *Id.*

268. *Id.* According to a recent CNN poll, the public in the United States views immigration as a generally important issue, with 29% of people surveyed who say that illegal immigration is "extremely important," 27% who deem immigration as "important," 32% who say that it is "moderately important" and 12% stating that it is "not important." *CNN/Opinion Research Corporation Poll*, Jan. 22-24, 2010, available at, <http://www.pollingreport.com/prioriti.htm>. However, immigration is ranked fifth in terms of being the most important issue

Moreover, the trend in these four Supreme Court cases was to hold in favor of the immigrant, rather than the government, as three of the four cases ruled against the Government.²⁶⁹ The first 2009 immigration case, *Flores-Figueroa v. United States*,²⁷⁰ involves identity theft.²⁷¹ The *Flores-Figueroa* Court held that the element of knowledge must be proved by prosecutors in identity fraud cases, in that the defendant must have known a fraudulent Social Security number belonged to a real person, as opposed to a fabricated person.²⁷² Thus, a heightened standard was required of the Government when prosecuting aggravated identity theft cases.²⁷³ Similarly the Government lost its case in *Nken v. Holder*, the subject of this case note, in which the Court held that the standard for granting stays was more lenient towards immigrants, in terms of permitting more stays of removal for aliens.²⁷⁴ Next, in *Negusie v. Holder*,²⁷⁵ the Court decided the issue of whether a provision of the INA prohibits individuals who have engaged in persecution from obtaining asylum when those individuals claim to have been forced to persecute others by threats to their lives.²⁷⁶ Once more the Court ruled in favor of the immigrant rather than the Government, and it reversed the BIA's decision and remanded the case so that the BIA could consider the issue under a different standard.²⁷⁷ The final decision, which stands apart from the previous three in that the Court held for the Government, is in *Nijhawan v. Holder*,²⁷⁸ a case involving an Indian immigrant who committed mail-fraud

that the United States faces today, with 75% of the general public viewing the economy as the biggest issue, followed by 7% for health care, 6% for the war in Iraq, 6% for terrorism and 5% for immigration. *Id.*

269. *Id.*

270. *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009).

271. Johnson, *supra* note 266.

272. *Id.*

273. *Id.*

274. *See generally id.*

275. *Negusie v. Holder*, 129 S. Ct. 1159 (2009). Although the article states that the case name is *Negusie v. Mukasey*, the correct title is *Negusie v. Holder*. *See generally* Johnson, *supra* note 266.

276. Johnson, *supra* note 266.

277. *Id.*

278. *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009).

conspiracy, among other crimes.²⁷⁹ In that case, the Court affirmed the decision of an Immigration Judge, which was affirmed by the BIA and the Court of Appeals, to remove the immigrant because he was convicted of an aggravated felony.²⁸⁰ In that case, the Immigration Judge was permitted to inquire into the prior conviction's underlying facts to determine whether the conviction was within the aggravated felony definition and victims' losses exceeded \$10,000.²⁸¹

The broader impact resulting from these latest Supreme Court cases is perhaps a limit on the Bush administration's "extreme position" on immigration-related matters.²⁸² The statement the Court seems to be making in these four cases is that "[t]he Bush administration made arguments that ran counter to the Courts [sic] general tendency in [the] areas [of statutory interpretation, equitable principles, and agency deference]" when dealing with immigrants.²⁸³ Therefore, it has been argued that immigration is not merely a politicized issue, but one that requires careful reading of the law rather than decisions based only on the policies of a given administration.²⁸⁴ Although immigration may not be a central legislative issue for the President this year, it seems as though the Supreme Court's has in turn put the issue at the forefront of its agenda.²⁸⁵ Therefore, in the near future, it is likely that immigrants will fare well in the hands of this Court, particularly in cases where the previous administration attempted to change traditional legal standards.

279. Johnson, *supra* note 266.

280. *Id.*

281. *Id.*

282. *Id.*

283. Johnson, *supra* note 266.

284. *See generally id.*

285. *See generally id.* The Supreme Court's increased interest in immigration law is mirrored by the visibility of courts of appeals' attention to the topic. *See generally* Linda Kelly Hill, *The Poetic Justice of Immigration*, 42 INDIANA L. REV. 1 (2009). However, scholars have noted that because the courts of appeals have been inundated with immigration appeals more recently, treatment of the issue and immigrants in general has been generally negative. *See generally id.* (discussing the negative rhetoric used in discussions regarding immigrants, illegal aliens and refugees by the federal courts of appeals).

VI. CONCLUSION

The Court's decision in *Nken*, with its literal interpretation of the IIRIRA statute, empowers courts to make independent decisions of whether or not to grant a stay to an alien who has been ordered to be removed, or deported. Although the Court does not articulate this reasoning, it has been suggested that recent Supreme Court opinions reflect the Court's disapproval of the treatment immigration has been getting from Congress, and the most recent presidents of this country.²⁸⁶ Similarly, courts of appeals are swamped with immigration appeals, and have been treating immigration unfavorably as a result of a surge in appeals. In the majority's words, the Court hoped to give judges additional time to decide immigration cases, relieving the pressure of getting a decision right in a brief time.²⁸⁷ The present case is framed in terms of asking whether a stay and an injunction are one and the same, or if injunctions do not encompass stays. Nevertheless, with its final holding, the majority makes it clear that the overarching matter at stake is the need for time, both for courts' and immigrants' sakes.²⁸⁸

Ultimately, the *Nken* decision centers on the core principles of this country, a nation founded by individuals hoping to find a place to live free from oppression.²⁸⁹ In a time when humanitarian and environmental atrocities are occurring throughout the world,²⁹⁰ it has been argued that it is critical to weigh the risks to aliens' safety when deciding whether to deport them as they await possibly life-changing judicial decisions. Echoing the majority's reasoning that courts' decisions may come too late if a stay of removal is not granted before adjudication is final, *Nken*'s attorney stated in an interview: "It's a case that could really literally mean life or death for my client . . . If he were deported while his appeal was pending, he is likely to be

286. Johnson, *supra* note 266.

287. See generally *Nken*, 129 S. Ct. at 1754 ("'No court can make time stand still' while it considers an appeal . . . and if a court makes takes the time it needs, the court's decision may in some cases come too late for the party seeking review.").

288. See *id.*

289. See generally Krezalek, *supra* note 12, at 281.

290. Including the earthquake in Haiti, genocide in the Sudan, sex tourism in various parts of Asia, for example.

killed or jailed or tortured in Cameroon.”²⁹¹ In many ways, the outcome of this case affected immigrants such as Nken by giving them the chance to remain safely within the United States until their case has been finally decided. Although some argue that this undermines the efficiency of the judicial process, those that support the outcome achieved here respond that it takes time to achieve justice. All things considered, the Court’s opinion in *Nken* reaffirmed the traditional judicial power of granting stays when time is of the essence. Its purpose was to remind Congress, the President, and the general public that courts need the authority to determine the credibility of individuals applying for asylum in order to serve this nation and justice, on the whole.

291. *Jenner & Block Associate Scores SCOTUS Win*, Dealbreaker: Above the Law, 2009 WLNR 7813462, Apr. 22, 2009.